In the Supreme Court of the United States.

OCTOBER TERM, 1922.

MICHAEL HEITLER, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 185.

NATHANIEL PERLMAN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 186.

MANDEL GREENBERG, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 187.

FRANK MCCANN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 188.

GEORGE F. QUINN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 189.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION TO DISMISS FOR WANT OF JURISDICTION.

Comes now the Solicitor General of the United States and moves the court to dismiss the above-entitled cases for want of jurisdiction.

I.

STATEMENT.

These cases, which involve convictions under an indictment charging a conspiracy to violate the Volstead Act, have been brought direct to this court on writs of error upon the sole ground that the construction or application of the Constitution of the United States is involved.

The assignments of error, so far as pertinent, thus present the question (R. pp. 57 and 58):

> The said District Court erred in denying the motions in arrest of judgment herein on behalf of the said Michael Heitler, Nathaniel Perlman, Michael Greenberg, George F. Quinn, and Frank McCann. The grounds of the said motion in arrest were as follows:
>
> 1. The National Prohibition Act is too vague, indefinite, and ambiguous to be enforced as a criminal statute and is violative of the fifth amendment to the United States Constitution.
>
> 2. The Congress was without authority under the Constitution of the United States and the amendments thereto to enact the said act and sections 3, 6, and 29 of Title II thereof.
>
> 3. The said act and the said sections thereof are violative of the ninth and tenth amendments of the Constitution of the United States in that the said act and the said sections thereof prohibit transactions in intoxicating liquors other than the manufacture, sale, transportation, importation, and exportation

thereof and in that the said act and the said sections thereof prohibit the purchase, transportation, sale, and possession for sale of intoxicating liquors for purposes other than beverage purposes.

4. The said act and the said sections thereof are unconstitutional and void in that neither the said act nor the said sections thereof are legislation appropriate to the enforcement of the eighteenth amendment to the Constitution of the United States within the meaning of section 2 of the said amendment.

The crux of the argument based upon said assignments of error is stated as follows in the brief of plaintiffs in error (p. 49):

> The National Prohibition Act is unconstitutional in that it prohibits intrastate transactions in intoxicating liquor other than manufacture, sale, and transportation, and in that it prohibits intrastate transactions in intoxicating liquor, including manufacture, sale, and transportation, for purposes other than beverage purposes.

II.

ARGUMENT.

The decision of this court in the *National Prohibition Cases*, 253 U. S. 350, fully disposes of the constitutional issues now sought to be raised, and as those cases were decided prior to the allowance of the writs of error in the cases at bar, the dismissal of the latter cases is fully justified.

In the *National Prohibition Cases, supra*, this court said (p. 387):

> 9. The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and *other intrastate transactions*, as well as importation, exportation, and interstate traffic, and is in nowise dependent on or affected by action or inaction on the part of the several States or any of them.
>
> * * * * *
>
> 11. While recognizing that there are limits beyond which Congress can not go in treating beverages as within its power of enforcement, we think those limits are not transcended by the provision of the Volstead Act (Title II, § 1), wherein liquors containing as much as one-half of 1 per cent of alcohol by volume and fit for use for beverage purposes are treated as within that power. *Jacob Ruppert* v. *Caffey*, 251 U. S. 264.

Moreover, in *Street* v. *Lincoln Safe Deposit Company*, 254 U. S. 88, also decided prior to the allowance of the writs of error in the cases at bar, this court again affirmed the validity of the Volstead Act.

It is now too late to urge that there are grounds of unconstitutionality which this court has heretofore failed to consider, and that therefore the several cases in which this court has sustained the validity of the Volstead Act must now be acknowledged to have been wrongly decided.

It is respectfully submitted the cases at bar present no constitutional question "substantial in character" (*Sugarman* v. *United States*, 249 U. S. 182, 184), and therefore the cases should be dismissed "for want of jurisdiction."

JAMES M. BECK,
Solicitor General.

JOHN W. H. CREW,
Assistant Attorney General.

HARRY S. RIDGELY,
Attorney.

NOVEMBER, 1922.

Nos. 185, 186, 187, 188 and 189.

IN THE

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

ARGUMENT IN OPPOSITION TO MOTION TO DISMISS FOR WANT OF JURISDICTION.

WEYMOUTH KIRKLAND,
Attorney for Plaintiffs in Error.
ROBERT N. GOLDING,
Of Counsel.

CHAMPLIN LAW PRINTING CO., CHICAGO

IN THE

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THE UNITED STATES

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

ARGUMENT IN OPPOSITION TO MOTION TO DISMISS FOR WANT OF JURISDICTION.

In opposition to the motion to dismiss, it is respectfully submitted that this Court has not yet passed upon the constitutional question involved herein. The *National Prohibition Cases* have been fully considered in the brief heretofore filed on behalf of the plaintiffs in error, beginning at page 45 thereof. We shall, therefore, not repeat such comment.

The passages cited from those cases in the suggestions of the learned Solicitor General in support of the motion are not in point. The ninth conclusion of the Court does not specify what intrastate transactions are within the power confided to Congress. We admit that intrastate transactions of manufacture, sale and transportation, for beverage purposes, are within the power confided to Congress. Whether or not intrastate transactions of gift, loan and exchange are within such power remains to be determined. The instant cases involve a decision on this point.

Nowhere in the *National Prohibition Cases* was any consideration given by counsel to the distinction between beverage and non-beverage uses, nor does the decision of the Court bear upon this point. This point is raised for decision, for the first time, in the instant cases.

The learned Solicitor General also cites the case of *Street* v. *Lincoln Safe Deposit Co.* as having decided, adversely to plaintiffs in error, the questions herein involved. In the *Street* case, counsel proceeded upon the theory

First: That the National Prohibition Act did not prohibit the particular kind of possession involved in that case; and

Second: If the Act did prohibit such possession, it was unconstitutional.

The Court decided that the Act did not prohibit such possession, and, therefore, the constitutional point raised was never reached for determination.

It is therefore apparent that neither of the two cases decided by this Court before the suing out of the writs of error herein involved the point raised in the instant cases, that is, that the Act is unconstitutional because it forbids intrastate transactions in intoxicating liquor

other than manufacture, sale and transportation, and because it forbids intrastate transactions in intoxicating liquor, including manufacture, sale and transportation, for purposes other than beverage purposes, i. e., for cooking, medicinal, mechanical, manufacturing purposes, etc.

We submit, without further argument, that this Court has not yet passed upon the constitutional question raised herein.

We further submit that, even if this Court has already passed upon this question, this Court has not decided it so many times that an attempt to raise further objections has become frivolous.

Respectfully submitted,

WEYMOUTH KIRKLAND,
Attorney for Plaintiffs in Error.

ROBERT N. GOLDING,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1922.

No. 185.
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Plaintiff in Error,
v.
THE UNITED STATES OF AMERICA,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.
HONORABLE EVAN A. EVANS, Circuit Judge, Presiding.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

WEYMOUTH KIRKLAND,
ATTORNEY FOR PLAINTIFFS IN ERROR.

ROBERT N. GOLDING,
Of Counsel.

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Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

HONORABLE EVAN A. EVANS, Circuit Judge, Presiding.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

STATEMENT OF FACTS.

The plaintiffs in error, Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Frank McCann and George F. Quinn (hereinafter described as defendants) were brought to trial at Chicago, in the Northern District of Illinois, Eastern Division, on the fifteenth day of February, A. D. 1921. They were charged with conspiring with twenty-six named co-defendants and with others to the grand jury unknown to violate the National Prohibition Act, to commit, in short, the offenses of purchasing certain whiskey in Kentucky, transporting it to Chicago, possessing it for sale and selling it in Chicago, all without a permit and for beverage purposes (Rec. 2).

Before the calling of the jury, on motion of the attorney for the United States, Messrs. O'Hara, Wissing, McCaffery, W. McGovern, Cohen and H. Block were dismissed from the case (Rec. 7). Although the record does not show it, it is but fair to disclose that Mr. McGovern was dismissed because of his demise before trial and Mr. Block was dismissed because he had not been apprehended. At various stages of the trial, Messrs. Galvin, Kane, Marner, Wagman, Smale, Knebelkamp, Wathen, Simmons, Judge, McLaughlin, Graham and Gindich were dismissed (Rec. 9-10).

The trial lasted until the seventh day of March, A. D. 1921, at which time the jury retired and the next day returned a verdict whereby the defendants Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Frank McCann, William Trudel and George F. Quinn were found guilty, and the co-defendants George Hans, William Gorman, James O'Leary, Nicholas Ambrosi, John McGovern

and George F. Callaghan were found not guilty (Rec. 308, 17). The trial court thereafter rendered judgment on the verdict and imposed sentences as follows (Rec. 47-50):

George F. Quinn—a fine of $2,000 without costs.

William J. Trudel—a fine of $2,000 without costs.

Frank McCann—a fine of $2,000 without costs.

Michael Heitler—to be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for 18 months and to pay a fine of $10,000, and one-third of the costs.

Nathaniel Perlman—to be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for 15 months and to pay a fine of $10,000, and one-third of the costs.

Mandel Greenberg—to be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for one year and a day and to pay a fine of $10,000, and one-third of the costs.

We do not intend to burden this Court with a lengthy and involved statement of facts. It is not necessary for the determination of the legal points herein involved for this Court to be familiar with minute details as set forth in the testimony. If, however, the Court cares to take the time to glance over the kind of testimony upon which these defendants were convicted, it will be found in the appendix, at page 161 hereof. The few observations hereinafter stated will, we believe, be helpful to the Court. If we are in error as to any statements made, the government will undoubtedly correct us.

The theory of the government was that Heitler, Perlman and Greenberg caused a certain car of Grand Dad whiskey to be purchased from the distillery at Hobbs, Kentucky, and transported to Gresham Station, Chicago. While the car was in transit these three, assisted by McCann and Quinn, sold the whiskey in one hundred case

lots to many saloonkeepers, among whom were certain co-defendants, and the government witnesses, Joy, Miller, the two Franks and Greengaard. When the car arrived at Gresham Station on October 1, 1920, Heitler, Perlman and Greenberg are supposed to have met it, unloaded it and distributed the whiskey to the purchasers, who had trucks there ready to haul away the liquor. After leaving the car, the trucks belonging to Joy and Miller, the two Franks and Greengaard, were held up and the whiskey stolen. These individuals then accused Heitler of having engineered the holdups and taken the whiskey.

The testimony offered by the government displayed the following characteristics:

(1) No document, or fact established by unprejudiced testimony, exists in the record which even tends to incriminate the defendants; the entire case of the government rests upon the words of approvers.

(2) The approver testimony is replete with contradiction; the approvers not only contradict each other on vital points, but no approver was able to avoid contradicting himself.

(3) The testimony of unprejudiced government witnesses tended to exculpate the defendants.

(4) It is apparent from the record that the approvers were testifying not merely to get immunity, but also to satisfy a personal grudge against the defendants. For instance, Joy admitted on the stand that he was testifying because the defendants would not pay him the money he had lost in the whiskey deal and that if they had paid him the money, he would not have testified (Rec. 132). Parentheticaly, Joy was as prominent during the trial as he was in the whiskey conspiracy before the indictment. When Judge Evans requested Assistant District Attor-

ney Glass to have Joy return to court the next day, Joy assured the learned Judge that it would be all right with him, saying, "Your Honor, I will be here anyhow. I will be here every day" (Rec. 139). He saw the government witness Greenwald before trial and told him to "Jazz the Jews" (Rec. 140) and instructed him as to his testimony, saying, "You know you saw Heitler and them at the car" (Rec. 142). He also, in the office of Assistant District Attorney Glass, tried to influence the testimony of Mr. Ortseifen, a witness for the defense (Rec. 167-8), and produced Todd as a witness in rebuttal, telling him that he, Todd, was lucky in being left out of the case that long, but it had gotten to the point where he had to bring Todd in in order to protect himself (Rec. 274).

The defendants not only denied specifically the incriminating facts testified to by the approvers, but also offered certain alibis (see Appendix, IV), and further offered an affirmative defense, which was as follows: The car of whiskey was purchased in Kentucky and brought to Chicago by Joy and Miller, who sold and distributed the whiskey to the Franks and others. After the approvers had lost their whiskey through the activity of gentlemen of the road, they thought that the defendants, principally Heitler, had engineered the holdups and had taken the whiskey. Then began a noisy and vigorous campaign to blackmail the defendants into paying the approvers the money which the lost whiskey was worth, culminating in a headline story on the first page of the Tribune and an investigation by the government. Now, what was the position of the approvers? Some one brought that whiskey to Chicago on a fraudulent permit—those facts were never denied by the defendants (Rec. 159, 291). When the defendants would not submit to blackmail, the approvers saw a chance to get not only immunity, but also revenge for the supposed robbery, so they accused the defendants of the crime.

From the foregoing statement of ultimate facts, it is apparent that the sole question in the case was, *who committed the crime?* We shall make no attempt to ask this Court to weigh conflicting testimony and shall make but little reference to evidence offered by the defense, as we admit that if credence be given to any one of the numerous and conflicting stories told by the approvers, enough evidence exists in the record to warrant the conviction of the defendants, except as to certain specific defenses hereinafter mentioned. We shall take this record as the government has made it and shall prove by the government witnesses themselves that the theory of the defense is supported by facts, while the theory of the government is supported by nothing but perjury.

We contend that this case was tried, both by the court and the government, upon an erroneous theory, which we shall hereafter show manifested itself at least eleven different times during the trial with resultant error. This erroneous theory was, in brief, that there was no question in the case as to the perpetrators of the crime and that the defendants could not, therefore, urge as a defense the fact that the guilty parties were the government witnesses themselves, and not the defendants. In explaining hereafter how the various errors in the case arose, we do not pretend to point out exhaustively the entire error, but only an outline thereof, in order that this Court may obtain a concise survey of the entire case. That part of the brief devoted to the specification of errors sets forth the errors completely.

When the grand jury returned the indictment, not a word was said therein (Rec. 2) *of Joy, Miller*, the Franks, *or other* approvers. Here is where the erroneous theory got its start. The grand jury put the approvers in the same class with Koeller, the government's sole unprejudiced witness. The approvers

were not to be tried, no evidence was to be admitted against them—they were merely witnesses. The defendants made two offers of proof to show that a conspiracy existed between the indictment, which charged that the other conspirators were unknown to the grand jury, and the fact, which was that they were known to have been the approvers (Rec. 229-31, 235-6), offering Joy and a grand juror as witnesses. On objection, the evidence was excluded. We have met the erroneous theory at its inception. So far as concerns the charge presented to the court, the approvers had done nothing, they were mere observers of facts, as was Koehler.

The defense tried to inquire into the liquor trade carried on by the approvers and was blocked by the erroneous theory. The learned trial judge, of his own motion, interrupted counsel and stopped further cross-examination of Mickey Frank as to individuals to whom he had sold liquor, saying (Rec. 105):

> "I think you have pursued that far enough. We are not trying that case.—I don't believe we ought to get into foreign issues."

We shall hereafter show this Court that, to all intents and purposes, according to the rules of law governing this particular class of case, the approvers were, in effect, on trial. The sole question before the jury was not, was a crime committed, but who committed it. We do not wish to fall into argument at this point, however, and will merely show how other error manifested itself.

The learned trial court sustained objection to the question asked of the approver Joy on cross-examination (Rec. 121), to-wit:

> "Did you have anything to do with the carload of whiskey that Miller got in January?"

The learned trial court, on objection by the government, refused to receive evidence, offered as part of the

defendants' case, that Miller had, in fact, received a carload of liquor (Rec. 232-3). The learned trial court also sustained objection to questions asked of Joy on cross-examination relative to persons to whom he had sold the liquor in question (Rec. 135-6). Here, we shall hereafter show, was material evidence bearing upon the question of who committed the crime. Our position is, that if the defense had been permitted to show that Miller had had a carload of Grand Dad whiskey before this one; that Joy, Miller and the Franks were wholesale dealers in illicit liquor, instead of mere casual vendors thereof, the probabilities were that they had brought this car to Chicago, and not the defendants, whose only liquor activities appear in connection with, and from the mouths of, the approvers. The learned trial court, on objection, refused to admit evidence offered by the defense to show that Joy had attempted to tamper with a witness (Rec. 168), evidence which we will hereafter show was material and competent.

When the learned trial court charged the jury, it refused to distinguish sharply between approvers as witnesses and honest, unprejudiced men as witnesses. Joy, whose freedom depended upon making the jury believe his story, was not sufficiently differentiated from Koeller, who was merely a narrator of events as he saw them, with no interest in the case. The affirmative instruction given (Rec. 298) was to the effect that the testimony of approvers, while not entitled to the same weight as that of an innocent party, was to be scrutinized carefully, not rejected, only cautiously accepted, and that one approver could corroborate another. The refused instruction (Rec. 307), we shall hereafter show, properly stated the law as applicable to this case.

Another error arose in the course of the trial, which was a direct result of the fact that the real issue was the

identity of the guilty parties. The indictment charged a conspiracy to commit four specified crimes and the trial court should have charged the jury that such was the case, describing the crimes accurately. Instead, the learned trial court charged, most informally, that the conspiracy charged was one to bring the liquor to Chicago and distribute it (Rec. 292-3, 294). In its opinion, the learned court said that it thus charged because the existence of the conspiracy was admitted (Rec. 39). Precisely. But the net result is, the defendants were thus deprived of a valid, technical defense, while at the same time, they were not permitted to take advantage of their real, substantial defense. This specific defense was, however, called to the attention of the court by motions to direct a verdict, being points 8 and 10 thereof, and by motions for a new trial, all of which were overruled (Rec. 11, 13, 14, 16, 20, 23, 26-7, 30, 41).

The erroneous theory, which we have seen woven through this entire case, culminated in what amounted to a directed verdict against the defendants. Notwithstanding the fact that the sole question in this case was whether Joy or Heitler had brought the car to Chicago and had sold the liquor, the learned trial court declined to charge the jury that the theory of the defense was that the approvers were the guilty parties and that the jury should consider them to the extent of determining whether they or the defendants were guilty (Rec. 302). Not only that, but the learned court went further and affirmatively charged the jury that they should not concern themselves with individuals not named in the indictment (Rec. 295). On the instructions of the court, what could the jury do, but return a verdict of guilty? *They were not permitted to determine the sole question in the case—Joy or Heitler, which?*

The defendants also contended that the evidence did not prove the commission of any one of the five overt acts charged in the indictment. This point was called to the attention of the learned trial court by motions to direct a verdict (Rec. 160, 282-7), by defendants' requested instruction "B" (Rec. 306) and by motions for a new trial. being point 25 thereof (Rec. 21, 24, 27, 31).

The defendants also presented for consideration the specific defense that the evidence did not prove the crime charged for the reason that, the indictment having charged a conspiracy to commit four offenses, the proof must show that the object was, in fact, the commission of those four offenses. This was presented by motions to direct a verdict, being points 8-10 thereof (Rec. 11-2, 13, 14-15, 16) and by motions for a new trial, being points 22 and 23 thereof (Rec. 20, 23, 27, 30).

The defendants also objected to the inflammatory remarks to the jury made by Assistant District Attorney Kelly during argument (Rec. 287-90) and urged the point in motions for a new trial, being points 1-4 thereof (Rec. 18, 21-2, 25, 28-9).

The constitutional point was specifically raised by motions to arrest the judgment (Rec. 42, 43, 44, 45), the motion of Quinn being made orally, but setting up the same grounds (Rec. 323).

Were it not for the fact that the record raises certain specific defenses which have never been before this Court for decision, and upon which the defendants should have a decision, we would be willing to rest our case upon the fact that the defendants did not receive a fair trial, due to the fact that the learned trial court applied an erroneous theory which blocked the defendants in presenting to the jury the only fact in issue so far as the jury was concerned.

SPECIFICATION OF ERRORS.

(*Arranged according to points*)

Point I.

This point does not specify error.

Point II.

The National Prohibition Act is unconstitutional.

The court erred in overruling defendants' motions in arrest of judgment, which said motions specified the grounds thereof as follows (Rec. 42-45, 323):

> "The National Prohibition Act is too vague, indefinite and ambiguous to be enforced as a criminal statute and is violative of the Fifth Amendment to the United States Constitution.
>
> The Congress was without authority under the Constitution of the United States and the Amendments thereto to enact the said Act and Sections 3, 6 and 29 of Title II thereof.
>
> The said Act and the said Sections thereof are violative of the Ninth and Tenth Amendments of the Constitution of the United States in that the said Act and the said Sections thereof prohibit transactions in intoxicating liquors other than the manufacture, sale, transportation, importation, and exportation thereof and in that the said Act and the said Sections thereof prohibit the purchase, transportation, sale and possession for sale of intoxicating liquors for purposes other than beverage purposes.
>
> The said Act and the said Sections thereof are unconstitutional and void in that neither the said Act nor the said Sections thereof are legislation appropriate to the enforcement of the Eighteenth Amendment to the Constitution of the United States within the meaning of Section 2 of the said Amendment."

Point III.

Errors predicated upon the erroneous theory of the case entertained by the learned trial court.

1. The court erred in preventing, of its own motion, further cross-examination of the approver Mickey Frank with respect to individuals to whom said Frank had sold liquor (Rec. 105).

2. The court erred in sustaining the objection of the government to the following question asked of the approver Joy:

   "Did you have anything to do with the carload of whiskey that Miller got in January or February?" (Rec. 131.)

3. The court erred in excluding evidence to prove that the approver Miller had a carload of Grand Dad whiskey in February, 1920, and that he had disposed of it, the ruling of the court being on the ultimate fact and not on any particular piece of evidence. (Rec. 232-3.)

4. The court erred in excluding evidence offered by the defendants to prove that Joy and Miller had been in other liquor deals between the effective date of the Prohibition Act and October 1st, 1920, the ruling of the court being on the ultimate fact and not on any particular piece of evidence (Rec. 233).

5. The court erred in sustaining the objection of the government to the line of cross-examination directed to the approver Joy, designed to elicit from him information as to the individuals to whom he had sold liquor in the course of the present conspiracy, the ruling of the court being on the ultimate fact and not on the questions themselves (Rec. 135-6).

6. The court erred in declining to give defendants' requested instruction "C," which was as follows (Rec. 307):

"The court instructs the jury that certain witnesses who have testified for the government—that is, the witnesses Morris Frank, Harry Frank, Louis Greengaard, John Fitzpatrick, John Miller and Maurice Joy—may be found by the jury to be accomplices. Accomplices are those who upon their own confession stand contaminated with guilt and admit participation in the very crime which they endeavor, by their testimony, to fix upon the defendants. If the jury find that any witness is such an accomplice, then the court further instructs the jury that an accomplice is an admissible witness, and a conviction may be had on the uncorroborated testimony of such a witness if the story as told is straightforward and has a ring of truth and indicates unequivocally the guilt of the defendants, but the jury are cautioned and advised to weigh carefully such testimony, to take into consideration the inducements or temptations which might prompt such a witness to testify falsely, to consider the feeling or interest and the general demeanor of such a witness on the stand. And finally, the jury are advised not to convict on the testimony of an accomplice unless corroborated by other testimony of an untainted character or by material facts established by independent evidence.

Corroboration, within the meaning of this rule, means such support given to the accomplice's testimony as tends to establish the truth of that portion of his testimony which connects the defendants with the crime. It is not sufficient that some testimony may be found to establish a fact or circumstance testified to by an accomplice. The supporting testimony must also corroborate on the matter of guilt. It must have a tendency to prove what the accomplice's testimony, standing alone, was intended to prove."

7. The court erred in charging the jury on accomplice testimony as follows (Rec. 298):

"Certain of the Government's witnesses have

been called accomplices. They are witnesses who admit that they are parties to the crime charged in the indictment. Their testimony should be scrutinized closely to ascertain whether they are influenced or not by any hope of immunity or by any other unworthy motive. Admitting their own guilt, their testimony is not entitled to the same weight as the testimony of an innocent party.

But the fact that certain witnesses who have testified may be accomplices, or that the defendants are interested in the outcome will not justify you in rejecting their testimony on that ground alone.

Let me refer again to an imaginary case by way of illustration, to aid you in determining what weight might be given to the testimony of an accomplice. Assume, if you will that A and B are indicted and on trial for entering the house of X in the night time and with the intent to burglarize it. C appears as a witness and states that he was with A and B on the night in question and all three of them broke into the house of X and took therefrom moneys, jewelry and bonds. Now, C's testimony shows him to be a confessed accomplice. The jury would therefore approach his testimony with some caution. They would be required to scrutinize it closely, not reject it, but scrutinize it carefully, and only cautiously accept it.

Now, assume that there is other testimony,—that X testified that he and his family left home early that evening, and returned home early the next morning, and found their house had been burglarized and that moneys, jewelry and bonds had been taken and the description of the goods taken corresponded with C's testimony. There would be corroboration of C's testimony.

Now, assume further that another witness testified that he saw the three, A, B, and C together at a place and at an hour quite unusual and yet consistent with C's entire story. In such a case, the corroboration of details in C's story might make C's testimony most persuasive of the truth."

8. The court erred in declining the oral request of the defendants to charge the jury that the theory of the

defense was that the conspiracy to buy, transport and sell the whiskey in question was a conspiracy on the part of Joy and other government witnesses and that the jury should consider Joy, Miller and others to the extent of determining whether they or the defendants were the conspirators (Rec. 302).

9. The court erred in declining to admit evidence offered by the defense to show that the approver Joy, in the office of Assistant United States Attorney Glass, tried to influence the testimony of George Ortseifen, the ruling of the court being on the ultimate fact and not on any particular piece of evidence (Rec. 167-8).

10. The court erred in sustaining the objection of the government to, and in declining to receive, the evidence offered by the defendants to show a variance between the indictment and the fact, to-wit, evidence to prove that the approvers were known to the grand jury to have been conspirators and were not unknown, the ruling of the court being on the ultimate fact and not on any particular piece of evidence (Rec. 129-31, 233-4).

11. The court erred in charging the jury as follows (Rec. 292-3, 294):

"In this case, the government charges the defendants with having conspired to violate the National Prohibition law. Without going into details, let me say the National Prohibition Law provides that 'No person shall, on or after the date when the Eighteenth Amendment of the United States Constitution goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as provided in this act.'

In general it may be said that the law prohibits dealing in intoxicating liquor or shipping intoxicat-

ing liquor excepting for medicinal purposes or for sacramental uses, and for these uses permits must be issued by the duly constituted agencies of the government. It was therefore unlawful to ship whiskey from Louisville, Kentucky, to Chicago, without a lawful permit. It was unlawful to sell this liquor and unlawful for any individual to have this liquor in his possession unless it was for medicinal or sacramental uses.

I charge you that the shipment of the liquor to Chicago was illegal and its sale or possession in Chicago was illegal and in violation of the National Prohibition law, unless you find that such possession or such sale was for medicinal purposes or sacramental uses.

You should therefore, early direct your attention to this question: Was there a conspiracy to thus violate the National Prohibition Law?

Now, briefly stated, the government claims that the evidence tends to establish that certain individuals formed a conspiracy to violate the National Prohibition Law by causing a certain carload of whiskey to be secured at Hobbs, Kentucky, and to be shipped to Chicago, Illinois, under an alleged government permit, and to be unloaded in Chicago and distributed to persons who were not under the law entitled to receive the same."

Point IV.

The evidence does not prove the commission of any one of the overt acts charged in the indictment.

1. The court erred in declining to direct a verdict of not guilty on the respective motions of the defendants made at the close of the evidence for the United States (Rec. 160) and at the close of all the evidence in the case (Rec. 282-7), the point being raised by paragraphs 5 and 6 of said latter motions.

2. The court, after instructing the jury, at the request of the defendants, as follows (Rec. 306):

"The court instructs the jury that before any defendant can be convicted, the evidence must show beyond a reasonable doubt that a conspiracy existed as charged in the indictment, and that, at least one of overt acts charged in the indictment was done by a conspirator to effect the object or end of this conspiracy. By the dismissal from this case of Morris H. Gindich, O. H. Wathen, and W. F. Knebelcamp, the second and third overt acts are removed from consideration as overt acts done by a conspirator. To warrant a conviction of any defendant, the jury must not only be convinced that a conspiracy existed as charged in the indictment, but the jury must also be convinced beyond a reasonable doubt that, in order to effect the object of the said conspiracy, either * * *

Or Third; that Michael Heitler, Nathaniel Perlman and Mandel Greenberg were conspirators and that they, or one or two of them, on October 1, 1920, were not only present at Gresham Station, but also unloaded the whiskey from the freight car,"

erred in qualifying the charge as follows (Rec. 306):

"I want to say with reference to that last that it does not have to be shown that they personally picked up the cases and carried them out. They could have participated in unloading the freight car without personally having carried out the goods."

3. The court erred in declining to grant a new trial on the respective motions of the defendants (Rec. 309-21), the point being raised by paragraphs 25 and 26 of said motions.

Point V.

The remarks of counsel for the United States, in argument to the jury, constitute reversible error.

The remarks of counsel were as follows (Rec. 287, 288, 289, 290):

"Now, we will take the case of Mandel Greenberg. We have shown by the testimony of Mossy Joy, and Miller, and Moore, that Mandel Greenberg was one of the Big Three in this conspiracy, notwithstanding the fact that Mandel Greenberg presented a framed alibi for the consideration of this jury.

If you have any tears, prepare to shed them now, Mike Heitler is ascending the witness stand. With measured tread and downcast eyes, Mike walks to the chair. You would think that Mike was going to the electric chair, he is so shocked. In answering questions of his counsel, he is meek and humble, 'Yes, sir; no sir.'

Why, it is not the same man that threatened Morris Frank with death in the Englewood Station. It is not the same King of the Underworld, who, by the snap of his finger, holds the lives of men in his grasp.

Mike is true to his type, yellow, when he is cornered, resorting to any means to get out of a tight place.

If all the tears that Mike caused were gathered in one reservoir, Mike Heitler could swim in it.

Mike was playing a part when he sat in this witness chair. He is a great actor. He wanted to impress and show you how meek and humble he is.

How much like Shylock Mike looked. He demanded his pound of flesh and he bled his victims—

The evidence shows here that Mossy Joy got back his diamonds, his stickpin and his ring, and he got them back after he made this demand on Heitler.

Now, if Heitler had nothing to do with this, how could Heitler have gotten him back his diamond ring and his stickpin?"

Point VI.

The evidence does not prove a conspiracy to commit the four crimes charged as the object thereof.

1. The court erred in declining to direct a verdict of not guilty on the respective motions of the defendants made at the close of the evidence for the United States (Rec. 160) and at the close of all the evidence in the case (Rec. 282-7), the point being raised by paragraphs 2 and 10 of said latter motions.

2. The court erred in declining to grant a new trial on the respective motions of the defendants (Rec. 309-21), the point being raised by paragraph 23 of said motions.

BRIEF OF ARGUMENT.

Point I.

The writs of error were not taken frivolously.

Point II.

The National Prohibition Act is unconstitutional in that it prohibits intrastate transactions in intoxicating liquor other than manufacture, sale and transportation, and in that it prohibits intrastate transactions in intoxicating liquor, including manufacture, sale and transportation, for purposes other than beverage purposes.

Point III.

Errors predicated upon the fact that the trial court entertained an erroneous theory of the case, resulting from a failure to appreciate that the question of fact in the case was limited to the identity of the perpetrators of an admitted crime.

Point IV.

The evidence does not prove the commission of any one of the overt acts alleged in the indictment.

Point V.

The remarks of counsel for the government during argument constitute reversible error.

Point VI.

There is no evidence in the record to prove the crime as charged, to-wit, a conspiracy to commit all four offenses charged as having been the object thereof.

Point I.

The writs of error were not taken frivolously.

I.

The defendants contend that the National Probihition Act is unconstitutional.

Analysis of the Act, showing the prohibitions thereof.

II.

This Court has not yet passed upon the constitutional point raised herein.

Consideration of the *National Prohibition Cases,* 253 U. S. 350.

Point II.

The National Prohibition Act is unconstitutional in that it prohibits intrastate transactions in intoxicating liquor other than manufacture, sale and transportation, and in that it prohibits intrastate transactions in intoxicating liquor, including manufacture, sale and transportation, for purposes other than beverage purposes.

I.

Before the adoption of Amendment XVIII all police power over intrastate transactions in intoxicating liquor was vested solely in the several states.

A. The police power generally is possessed by the states.

Re Heff, 197 U. S. 488, 505, 506.

Hamilton v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156.

B. The police power is not only the power to enact legislation, but is also the power to refrain from enacting legislation.

Richards v. *Palace Laundry Co.*, 55 Utah 409, 186 Pac. 439.

Hammer v. *Dagenhart*, 247 U. S. 251, 273.

Robbins v. *Taxing District*, 120 U. S. 489, 493.

12 C. J. 909.

(See argument.)

II.

Amendment XVIII prohibits merely the manufacture, sale, transportation, importation and exportation of intoxicating liquor for beverage purposes and does not prohibit, nor grant the power to Congress to prohibit, any transaction in intoxicating liquor except the foregoing five, and does not prohibit, nor grant the power to Congress to prohibit, those five transactions when done for any purpose other than beverage purpose.

A. Section 1 of Amendment XVIII should be restricted to the natural meaning of the words used therein.

Lake County v. *Rollins*, 130 U. S. 662, 670.

Commonwealth v. *Campbell*, 133 Ky. 50, 117 S. W. 383.

The amendment is the first attempt to limit by a constitutional provision the use and enjoyment of previously acquired property,

Slaughter-House Cases, 16 Wall. 36, 68.

Texas v. *White*, 7 Wall. 700, 728,

and infringes, for the first time, upon the hitherto plenary and exclusive police power of the states.

Barbier v. *Connolly*, 113 U. S. 27, 31.

Every intendment is against divesting a state of any right.

U. S. v. *Herron*, 20 Wall. 251, 263.

B. Section 1 prohibits merely the said transactions when done for a specific, *i. e.*, beverage purpose.

The provisions of the section are self-executing.

National Prohibition Cases, 253 U. S. 350.
Civil Rights Cases, 109 U. S. 3.
Hodges v. *U. S.*, 203 U. S. 1.
Guinn v. *U. S.*, 238 U. S. 347.

A prohibition on sale does not include a prohibition on gift or other act of transfer,

Holley v. *State*, 14 Tex. Cr. App. 505.
Gillan v. *State*, 47 Ark. 555.
Bailey v. *U. S.* (C. C. A.) 267 Fed. 559.
State v. *Davis*, 130 Ala. 148, 30 So. 344.
Skinner v. *State*, 97 Ga. 690, 25 S. E. 364.
Keiser v. *State*, 82 Ind. 379.
State v. *Hutchins*, 74 Ia. 20, 36 N. W. 775.
State v. *Standish*, 37 Kan. 643, 16 Pac. 66.
Commonwealth v. *Abbott*, 147 Ky. 686.
Commonwealth v. *Packard*, 71 Mass. 101.
Jones v. *State*, 108 Miss. 530, 66 So. 987.
Green v. *Certain Liquors* (App. Div.) 160 N. Y. S. 126.
Wood v. *Territory*, 1 Ore. 223.
State ex rel. Columbia Club v. *McMaster*, 35 S. C. 1, 14 S. E. 290.
State v. *Cooper*, 26 W. Va. 338.

State v. *Fulks*, 207 Mo. 26, 105 S. W. 733.
Klein v. *Livingstone Club*, 177 Pa. St. 224, 35 Atl. 606,

nor does it include a prohibition on purchase.

Whitmore v. *State*, 72 Ark. 14, 77 S. W. 598.
Phillips v. *State* (Tex. Cr. App.) 40 S. W. 270.
Candill v. *Commonwealth*, 140 Ky. 556, 131 S. W. 386.
Lindsey v. *State* (Ark.) 219 S. W. 1024.
Hiers v. *State*, 52 Fla. 25, 41 So. 881.
Dial v. *State*, 159 Ala. 66, 49 So. 230.
People v. *Tart*, 169 Mich. 586, 135 N. W. 307.

Since "beverage purposes" means for the pleasure of drinking,

Commonwealth v. *Mandeville*, 142 Mass. 469, 8 N. E. 327,

an expressed prohibition on such purpose does not include non-beverage purposes.

State v. *Langdon*, 29 Minn. 393, 13 N. W. 187.
Rabe v. *State*, 39 Ark. 204.
Town of Selma v. *Brewer*, 9 Cal. App. 70, 98 Pac. 61.
Prowitt v. *City of Denver*, 11 Colo. App. 70, 52 Pac. 286.
Turner v. *Mayor of Forsyth*, 78 Ga. 683, 3 S. E. 649.
City of Carthage v. *Carlton*, 99 Ill. App. 338.
Donnell v. *State*, 2 Ind. 658.
Payne v. *State*, 74 Ind. 203.
State v. *Courtney*, 73 Ia. 619, 35 N. W. 685.
Commonwealth v. *Reynolds*, 89 Ky. 147.
People v. *Sharrar*, 164 Mich. 267, 130 N. W. 693.
King v. *State*, 58 Miss. 737.
State v. *Wray*, 72 N. C. 253.

Gue v. *City of Eugene*, 53 Ore. 282, 100 Pac. 254.
State v. *Billups*, 63 Ore. 277, 127 Pac. 686.
State v. *Dunning*, 14 S. D. 316.
Atkinson v. *State*, 46 Tex. Cr. R. 229, 79 S. W. 31.
Russell v. *Sloan*, 33 Vt. 656.
State v. *Bluefield Drug Co.*, 43 W. Va. 144, 27 S. E. 350.
Adams Express Co. v. *Kentucky*, 238 U. S. 190.

C. Section 2 grants a mere power of enforcement to Congress which cannot be used to extend the terms of Section 1; any such attempted extension is unconstitutional.

Notwithstanding the adoption of the amendment, the United States still remains a government of enumerated powers.

Hodges v. *U. S.* 203 U. S. 1, 16.

Legislation which seeks to extend the scope of self-executing prohibitions is not "appropriate" to the enforcement thereof.

Slaughter-House Cases, 16 Wall. 36.
U. S. v. *Cruikshank*, 2 Otto 542.
Civil Rights Cases, 109 U. S. 3.

The theory of implied or ancillary powers is not applicable to a power of enforcement.

(See argument.)

Even if it were, the limits are set by the original power and the ancillary power cannot be used to extend them.

Keller v. *U. S.*, 213 U. S. 138, 144.
Hammer v. *Dagenhart*, 247 U. S. 251, 273.
Bailey v. *Drexel Furniture Co.*, No. 657.

Assuming, however, that Congress has, by some means, known or unknown, acquired power to legislate in the entire field, the prohibition on non-beverage purposes is unconstitutional, since a non-beverage use not only has no tendency to result in a beverage use, but, in fact, makes such a use physically impossible.

City of Jacksonville v. *Chicago & Alton R. Co.*, 274 Ill. 152, 113 N. E. 91.

Eidge v. *City of Bessemer*, 164 Ala. 599, 51 So. 246.

City of Shreveport v. *Hill*, 134 La. 351, 64 So. 137.

City of Roswell v. *Eastern Ry. Co.*, 16 N. M. 685, 120 Pac. 303.

(See argument.)

III.

The National Prohibition Act, being unconstitutional, cannot be saved by striking out objectionable parts or by inserting limitations.

The statute, as it now stands, is valid legislation as to the District of Columbia, the territories and the Indian country

(See argument),

for the reason that the power of Congress is original as to

(a) District of Columbia
Loughborough v. *Blake*, 5 Wheat. 317,

(b) Territories
Binns v. *U. S.*, 194 U. S. 486,

(c) Indian country
Perrin v. *U. S.*, 232 U. S. 478.

The Court cannot and will not go through a statute with shears and paste and create a new act out of an old,

Employers' Liability Cases, 207 U. S. 463, 501,
U. S. v. *Reese,* 2 Otto 214,

nor should the Court do so if it could, since Congress has not pretended to keep within the enforcement power granted by the amendment.

James v. *Bowman,* 190 U. S. 127, 139.
(See argument).

A proper interpretation of this Act will restrict its operation to the District of Columbia, the territories and the Indian country.

U. S. v. *Dewitt,* 9 Wall. 41.

Point III.

Errors predicated upon the fact that the trial court entertained an erroneous theory of the case, resulting from a failure to appreciate that the question of fact in the case was limited to the identity of the perpetrators of an admitted crime.

I.

The case was tried on the wrong theory.
(See argument).

II.

The case should have been tried on the theory that Joy, *et al.,* were, in effect, on trial to the same extent as the defendants, and the defendants should have been permitted to prove that the approvers were the real culprits.

A. The theory of the defense was that Joy and the rest of the approvers were the guilty parties and were trying to shift the crime onto the defendants.
(See argument).

B. The facts in the record, as made by the government, support the theory of the defense.

(See argument).

C. The case was, therefore, such that the approvers as well as the defendants were on trial.

Harper v. *State,* 185 Ind. 322, 114 N. E. 4.
Kelley v. *State,* (Tex. Cr. App.) 216 S. W. 188.
Mandosa v. *State* (Tex. Cr.) 225 S. W. 169.
Ex parte Gilstrap, 14 Tex. App. 240.

III.

The excluded evidence should have been admitted because it tended to prove that the approvers, and not the defendants, were the real culprits.

A fact to be relevant and admissible need not be of high probative value.

1 Wigmore on Evidence, § 29.
Interstate Com. Com. v. *Baird,* 194 U. S. 25, 44.

A fact is relevant and admissible if, taken in connection with other admitted facts, or with an offer of proof of other facts, it tends to incriminate another and exculpate the defendants.

People v. *Myers,* 70 Cal. 582, 584, 12 Pac. 719, 720.
McDonald v. *State,* 165 Ala. 85, 89, 51 So. 629, 631.

The ultimate facts sought to be proved did more than to show mere motive or opportunity or participation on the part of a third person.

(See argument.)

The weight of the excluded evidence was for the jury, not the court.

State v. *Harris,* 153 Ia. 592, 133 N. W. 1078.

IV.

The defendants were entitled to a charge presenting to the jury their theory of the case and the trial court erred in refusing such requested charge.

Stevenson v. *U. S.*, 162 U. S. 313, 323.
Bird v. *U. S.*, 180 U. S. 356, 361.
Hendrey v. *U. S.* (C. C. A.) 233 Fed. 5, 18.
State v. *Gallivan*, 75 Conn. 326, 333, 53 Atl. 731, 733.
Payton v. *State*, 4 Okl. Cr. 316, 111 Pac. 666.
Hall v. *State*, 69 Tex. Cr. R. 332, 153 S. W. 902.

The error is most serious when the court has charged on the theory of the government,

Francis v. *State* (Tex. Cr. App.) 55 S. W. 488,

for justice and the law demand that the court also refer to facts favorable to the defense.

Allison v. *U. S.*, 160 U. S. 203, 212.

V.

The court erred in giving the instruction on accomplice testimony and in declining to give requested instruction "C" on accomplice testimony.

A. The instruction given was erroneous in that it failed to advise the jury against convicting unless corroboration was found in untainted testimony; the instruction refused contained a correct statement of the law

It is the duty of the court to advise the jury not to convict upon the uncorroborated testimony of an accomplice.

Reagen v. *U. S.*, 157 U. S. 301, 310.

Freed v. *U. S.* (App. D. C.) 266 Fed. 1012.
McGinniss v. *U. S.* (C. C. A.) 256 Fed. 621.
People v. *Aiello*, 302 Ill. 518.

The *Caminetti* case has not changed the rule. (See argument).

B. The instruction given was also erroneous in that it failed to state correctly the rule of corroboration, said instruction permitting the jury to find corroboration in the testimony of fellow approvers and in other testimony not corroborative as to guilt; the instruction refused properly stated the law.

The crime itself cannot be corroborating evidence as to who committed it.

Sykes v. *U. S.* (C. C. A.) 204 Fed. 909.
McNealley v. *State*, 5 Wyo. 59, 36 Pac. 824.

One approver cannot corroborate another.

Jones v. *Commonwealth*, 111 Va. 862, 868, 69 S. E. 953, 955.
U. S. v. *Hinz*, 35 Fed. 272, 281.
Ratcliff v. *State* (Tex. Cr. App.) 229 S. W. 857.
16 C. J. 710, § 1453.

The corroboration must be as to guilt.

Sykes v. *U. S.* (C. C. A.) 204 Fed. 909, 913.
Jones v. *Commonwealth*, 111 Va. 862, 869, 69 S. E. 953, 955.
Smith v. *State*, 10 Wyo. 157, 166, 67 Pac. 977, 979.
Howard v. *Commonwealth*, 110 Ky. 356, 361, 61 S. W. 756, 758.
Clapp v. *State*, 94 Tenn. 186, 195, 30 S. W. 214, 216.
Courson v. *State*, (Ga. App.) 94 S. E. 53, 54.
3 Russell on Crimes (7th ed.) 2288.
16 C. J. 701, § 1434.

Corroboration or no is tested by eliminating the testimony of the approvers from the case.

Welden v. *State*, 10 Tex. App. 401.

If that be done in this case, not a scintilla of evidence remains.

(See argument).

VI.

The court erred in declining to admit evidence to show that Joy had tried to influence the witness Ortseifen in the office of the Assistant District Attorney.

(See argument).

VII.

The court erred in sustaining the objection of the government to, and in declining to admit, evidence offered by the defendants to show a variance, to wit, evidence to prove that the approvers were known to the grand jury to have been conspirators and were not unknown.

A. In the courts of the United States, a variance arising from the fact that the evidence does not support an allegation that a thing is unknown to the grand jury, is a matter of affirmative defense which can be proved by the defense.

1. A variance resulting from failure of the proof to correspond with the allegations of the indictment is fatal.

U. S. v. *Riley*, 74 Fed. 210.
Naftzger v. *U. S.* (C. C. A.) 200 Fed. 494, 501.
State v. *Smith*, 89 N. J. L. 52, 97 Atl. 780.
People v. *Hunt*, 251 Ill. 446, 96 N. E. 220.

The variance may appear from the evidence offered by the prosecution.

Johnson v. *State*, 4 Ala. App. 62, 58 So. 754.

2. If it does not so appear, the averment is presumed to be true.

Coffin v. *U. S.*, 156 U. S. 432, 451.

3. The result of the presumption is to shift the burden of proof onto the defendant.

4 Wigmore on Evidence, § 2490.

Holt v. *U. S.*, 218 U. S. 245, 253.

B. The offer of proof was complete and satisfied all legal requirements.

1. The inquiry is as to the actual knowledge of the grand jury.

Com. v. *Glover*, 111 Mass. 394, 401.

Enson v. *State*, 58 Fla. 37, 40, 50 So. 948, 949.

2. The defendants offered to prove the actual knowledge of the grand jury by the witness who testified, and by a member of the grand jury who heard.

The grand juror was a competent witness.

Atwell v. *U. S.* (C. C. A.) 162 Fed. 97.

State v. *Benner*, 64 Me. 267.

Com. v. *Hill*, 11 Cush. 137.

Com. v. *Mead*, 12 Gray 167.

Com. v. *Green*, 126 Pa. St. 531, 17 Atl. 878.

12 R. C. L. 1039.

C. The variance was, therefore, fatal since the crime of conspiracy is not an exception to the general rule (See argument),

nor should it be.

State v. *Van Pelt*, 136 N. C. 633, 641.

Com. v. *Hunt*, 45 Mass. 111.

D. The cases cited in the opinion of the learned trial court, and the reasoning appearing therein, do not support its ruling.

(See argument).

VIII.

The court erred in giving the instruction which purported to describe to the jury the charge in the indictment, in that the offense so described was not the offense with which the defendants were charged.

The instruction was erroneous in that it omitted and misdescribed a necessary element of the crime, to-wit: beverage purposes.

The government was required to prove the beverage purpose.

State v. *White*, 31 Kan. 342, 2 Pac. 598.

The error was not corrected by any other instruction.

(See argument).

Point IV.

The evidence does not prove the commission of any one of the overt acts alleged in the indictment.

I.

The overt act is an element of the crime and, as such, at least one of the overt acts alleged in the indictment must be proved as alleged.

The overt act is a necessary element.

U. S. v. *Rabinowich*, 238 U. S. 78, 86.

Ryan v. *U. S.* (C. C. A.) 216 Fed. 13, 32.

Gruher v. *U. S.* (C. C. A.) 255 Fed. 474, 476.

It must be charged in the indictment.

Pettibone v. *U. S.*, 148 U. S. 197, 202.

Thomas v. *U. S.* (C. C. A.) 156 Fed. 897, 906.

Having been alleged, it must be proved.

U. S. v. *Hamilton*, Fed. Cas. 15288.

U. S. v. *Ault*, 263 Fed. 800, 803.

II.

The overt act must be an act to effect the object and cannot be the object itself.

The evidence does not show the commission of overt act No. 1, except possibly the collection of money from Ambrosi.

(See argument.)

The sale to Ambrosi was not an act to effect the purchase, transportation or possession for sale charged in the indictment.

(See argument.)

It, being a sale, could not "effect" the sale as charged in the indictment.

(See argument.)

Dealy v. *U. S.*, 152 U. S. 539, 546.

Lonabaugh v. *U. S.* (C. C. A.) 179 Fed. 476, 479.

U. S. v. *Dowling*, 278 Fed. 630, 639.

U. S. v. *Ault*, 263 Fed. 800, 804.

III.

The evidence does not prove the commission of overt act No. 5 as alleged.

(See argument.)

(Overt Acts Nos. 2, 3 and 4 are out of the case as the result of the discharge or acquittal of the doers of said acts.)

Point V.

The remarks of counsel for the government during argument constitute reversible error.

I.

The remarks were error.

A. Remarks dealing in personalities.

It was improper to declaim that the defendant Heitler was a King of the Underworld, a Shylock who bled his victims, a causer of so many tears that he could swim in them if they were gathered in one reservoir.

Hall v. *U. S.*, 150 U. S. 76.
Lowdon v. *U. S.* (C. C. A.) 149 Fed. 673
Ivey v. *State*, 113 Ga. 1062.

No charge that could have been given by the court would have removed the prejudice created by these remarks.

Union Pac. R. R. Co. v. *Field* (C. C. A.) 137 Fed. 14, 16.
Latham v. *U. S.* (C. C. A.) 226 Fed. 420, 425.

No evidence existed in the record to support any such remarks.

(See argument.)

B. Remarks purporting to deal with the evidence in the case.

It was improper to assert as a fact the Mandel Greenberg's alibi was "faked."

(See argument.)

It was improper to assert that Heitler procured the return of Joy's diamonds, as no evidence existed in the record from which any such deduction could logically, or even illogically, be drawn.

(See argument.)

II.

The remarks were not cured by instructions.

(See argument.)

Point VI.

There is no evidence in the record to prove the crime as charged, to-wit, a conspiracy to commit all four offenses charged as having been the object thereof.

I.

The government, having charged a conspiracy to commit four offenses, must prove that the conspiracy did, in fact, have as an object the commission of all four offenses.

A. The object of the conspiracy is an element of the crime and must be proved as alleged.

5 R. C. L. 1087.

12 C. J. 627.

B. If the indictment charge a conspiracy to commit four offenses, and the proof show a conspiracy to commit but one, two or three of said offenses, the proof has not sustained the allegations of the indictment.

1. To constitute a conspiracy there must be a common specific intent.

Frohwerk v. *U. S.*, 249 U. S. 204, 209.

(See argument.)

2. If the proof show a different intent, whether as to the means employed or the object, the indictment has failed of proof.

Rabens v. *U. S.* (C. C. A.) 146 Fed. 978.
Lawrence v. *State*, 103 Md. 17, 63 Atl. 96.
People v. *Brown*, 159 Ill. App. 396.
Lowell v. *People*, 229 Ill. 227, 82 N. E. 226.
Commonwealth v. *Harley*, 48 Mass. 506.
State v. *Hadley*, 54 N. H. 224.

3. If the proof show that the object of the conspiracy was merely a part of the object charged, the indictment has failed of proof.

Rex v. *Pollman*, 2 Campb. 229.
O'Connell v. *The Queen*, 11 Cl. & F. 155.

II.

There is no evidence in the record to prove that any conspiracy existed to commit all four offenses

(See argument),

nor is there any evidence, in fact, to prove that the defendants were parties to any conspiracy either to purchase, transport or possess

(See argument),

nor is there any evidence to prove that any transaction shown was for beverage purposes.

State v. *Lesh*, 27 N. D. 165, 145 N. W. 829.

ARGUMENT ON BEHALF OF PLAINTIFFS IN ERROR.

Point I.

The writs of error were not taken frivolously.

I.

The defendants contend that the National Prohibition Act is unconstitutional in that it prohibits intrastate transactions in intoxicating liquor other than manufacture, sale and transportation, and in that it prohibits intrastate transactions in intoxicating liquor, including manufacture, sale and transportation, for purposes other than beverage purposes, notwithstanding the fact that the operation of Amendment XVIII, and the power of Congress derived therefrom, as to intrastate transactions, are limited to the prohibition of manufacture, sale and transportation for beverage purposes.

A. The amendment, and the power of Congress derived therefrom, are limited to the prohibition of intrastate transactions of manufacture, sale and transportation, and these only when done for beverage purposes.

We shall hereafter show that Amendment XVIII is limited in its operation to the prohibitions therein contained, and we shall further show that Congress must confine itself to the limits established by the amendment and cannot wander at will outside of those limits, cannot prohibit a gift, about which the amendment is silent, and cannot prohibit a sale for a non-beverage purpose. This will be shown in two ways, to wit:

1. By the effect of Amendment XVIII upon the hitherto plenary and exclusive police power of the states, and

2. By the effect of the amendment upon the hitherto enumerated and implied powers of Congress.

B. The Prohibition Act prohibits intrastate transactions not prohibited by the amendment and prohibits such transactions, and manufacture, sale and transportation, for purposes not prohibited by the amendment.

We frankly admit that, in interpreting the statute, it should be presumed that Congress intended to keep within its constitutional powers, but, since it is the statute, not the intent, which must be constitutional, we respectfully submit that the test of constitutionality is what may be done thereunder by those in authority (*State* v. *Williams,* 146 N. C. 618, 630, 61 S. E. 61, 65; *Colon* v. *Lisk,* 153 N. Y. 188, 194, 47 N. E. 302, 303), for the mere fact that power has touched lightly in the past is no indication that it will not annihilate in the future (*Brown* v. *Maryland,* 12 Wheat. 419, 439).

1. Section 3, which purports to be the enacting clause of the statute, is as follows:

> "No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.
>
> Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor."

Giving effect to all of the words of Section 3, as we must (*U. S.* v. *Lexington Mill & Elevator Company*, 232 U. S. 399, 410), we find, among other things, that liquor (without specification of purpose) may not be manufactured, sold, bartered, transported, imported, exported, delivered, furnished or possessed, except as authorized in the Act. Liquor for non-beverage purposes may, however, be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as in the Act provided. These two provisions amount to the same thing. The Commissioner may issue permits, but only for such non-beverage sales, etc., as are permitted by the Act.

In *Kidd* v. *Pearson*, 128 U. S. 1, this Court had under consideration a prohibition law of Iowa (Code of Iowa, Ch. 6, Title 11, amended by Ch. 143, Acts of the General Assembly, 1884) of which Section 1523 provided that "no person shall manufacture * * * any intoxicating liquors, except as hereinafter provided; * * *." Section 1524 thereof continued "* * * and nothing contained in this law shall prevent any person from manufacturing in this State liquors for the purpose of being sold, according to the provisions of this chapter, to be used for mechanical, medicinal, culinary, or sacramental purposes." The decision of the Court was that Section 1523 was an unqualified prohibition on any and all manufacture, except as modified by the four specific exceptions of Section 1524. In *State* v. *Certain Intoxicating Liquors* (Utah) 172 Pac. 1050, the Court had before it a statute which forbade the manufacture, sale, etc., of intoxicating liquor within the state "except as hereinafter provided" and the decision of the Court was that it was the legislative intent to not only forbid the possession, but also to abolish property rights in alcoholic liquors within the confines of the state, aside from the exceptions expressly

provided for in the Act. This Court has stated in *Grogan* v. *Hiram Walker & Sons*, No. 615, decided May 15, 1922, that Section 3 "provides that, except as therein authorized, after the 18th Amendment goes into effect no person shall manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor."

By the plain and natural meaning of this provision, and in accordance with the interpretation given to similar provisions in the cases above cited, any sale or gift, for instance, to be rendered lawful must be authorized by an exception in the act. "Dispose of" and "furnish," being broader terms than gift, include it (*State* v. *Deusting*, 33 Minn. 102, 22 N. W. 442), and that such was the legislative intent is disclosed by a reference to Section 33, wherein it is provided that, under certain circumstances, possession shall be *prima facie* evidence of an intent to give away liquor in violation of the provisions in Title II.

2. Section 6 contains further limitations, in that it provides that "no one shall manufacture, sell, purchase, transport or prescribe any liquor without first obtaining a permit from the Commissioner so to do."

In *State* v. *Douglass*, 37 Tenn. 608, the Court had before it an indictment under a statute (Act of 1820, Ch. 13) which forbade the keeping of a billiard table "without first having obtained a license therefor." The Act of 1817, Ch. 179, had made it unlawful for any clerk to issue such a license. The circuit court quashed the indictment and the state appealed. In reversing the judgment and remanding the cause, the Supreme Court, speaking through Mr. Justice Wright, said, at page 609:

> "It is said the court below proceeded upon the ground, that inasmuch as the Act of 1820 forbids the keeping of a billiard table 'without first having obtained a license therefor'; and the act of 1817 pro-

> hibits the license altogether, it must be implied that the Legislature meant to provide means to take out license, and having failed to provide the means of doing the act lawfully, which it did not intend absolutely to prohibit, the license cannot be required. This construction cannot be maintained. If the Legislature say that an act shall not be performed, except upon a condition precedent, which it is impossible to perform, the condition is valid and the prohibition absolute."

The effect of Section 6, then, is to prohibit the transactions therein named unless a permit be obtained, and if no provision can be found in the Act permitting the issuance of a permit for any given transaction for any given purpose, then such transaction for such purpose is forbidden by the Act.

3. Section 29, in so far as it is important in this case, is as follows:

> "Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.
>
> Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years."

The penalties imposed by this section are not on the sale, etc., of intoxicating liquor for beverage purposes, but are on the sale in violation of Title II or any provi-

sion thereof. One who makes a bona fide sale for a non-beverage use is subject to the same penalty as one who bootlegs for beverage purposes.

4. Analysis of Title II of the National Prohibition Act.

Title II, by Section 3, first prohibits certain transactions, except as later authorized in the Act, and then, by Section 6, prohibits certain of those transactions without a permit. It is elementary that an exception is strictly construed and no case is taken out of the operation of the statute unless the case comes clearly within the exception (Lewis' Sutherland Statutory Construction, 2nd Ed., Sec. 351-353). In this Act, however, Congress has made but few exceptions, clear or otherwise, to the operation of the blanket prohibitions of Sections 3 and 6.

The Act contains provisions relative to permits, but all such provisions are additional prohibitions, or regulations descriptive of permits which may be issued. For the sake of clarity, and in order to assist those who would controvert our interpretation of this Act, we may, perhaps, be permitted to ask the following: Under and by virtue of what specific section, provision or sentence of the National Prohibition Act is it permissible

(1) To give away or loan intoxicating liquor for any purpose;

(2) To purchase, manufacture or sell intoxicating liquor for culinary use;

(3) To give, deliver or furnish intoxicating liquor to one's wife to be by her used for culinary purposes;

(4) To sell or purchase intoxicating liquor to be kept in the home as a household remedy for medicinal purposes, the recipient not being ill at the moment of purchase or of obtaining the prescription;

(5) To manufacture, sell or purchase intoxicating liquor to be kept in hospitals for medicinal use, including pure alcohol for use in alcohol rubs, and, if a permit be necessary in any of the above instances, under and by virtue of what specific section, provision or sentence of the National Prohibition Act may it be demanded and obtained, from whom and how?

The reply can only be, that when Section 3 says that liquor for non-beverage purposes may be sold, etc.,

> "but only as herein provided,"

it does not mean that at all, but means that liquor for non-beverage purposes may be sold,

> "and the Commissioner may * * * issue permits therefor."

Yes, he may; but then again, he may not. Does this provision mean that the Commissioner has an absolute discretion as to whom, when and why he will issue a permit? If not, where in the Act is there any provision which states the circumstances under which a permit shall issue? The section is, in fact, an attempt to confer upon the Commissioner an absolute discretion (*Yick Wo* v. *Hopkins*, 118 U. S. 356), and he has so interpreted it (Regulations 60, Article II, Sec. 4). Such an attempted delegation of unlimited discretion is plainly void (*Yick Wo* v. *Hopkins, supra; Noel* v. *People*, 187 Ill. 587,58N. E. 616; *Village of Little Chute* v. *Van Camp*, 136 Wis. 526, 117 N. W. 1012; *Newbern* v. *McCann*, 105 Tenn. 159, 58 S. W. 114; *Devereaux* v. *Township Board of Genesee* (Mich.) 177 N. W. 967). Those who would uphold the constitutionality of this Act will find but little, if any, solace in this particular provision thereof.

II.

This Court has not yet passed upon the constitutional point raised herein.

Prior to the allowance of the writs of error and the transference of the record to this Court, and, indeed, up to the present writing, the question of the constitutionality of the sections of the Act involved in this case has not been presented to this Court for determination. The only cases which might possibly be claimed to have decided the principle involved are the *National Prohibition Cases,* 253 U. S. 350. These seven cases involved points in connection with Amendment XVIII which are not here in question, the only section of the Act considered by the Court in those cases being Section 1 of Title II. These cases have, however, caused considerable confusion, due to a failure to analyze the set of facts before the Court. A considerable number of the members of the bench and bar, having in mind the statement of Mr. Justice Clarke (dissenting) that the eleventh conclusion of the Court

> "approves as valid a definition of liquor as intoxicating which is expressly admitted not to be intoxicating in each of the cases in which it is considered,"

have taken it for granted that the decision of the Court was that Congress could prohibit the sale, etc., of a non-intoxicant in order to enforce the prohibition on the sale of intoxicants. Such being the case, we may be pardoned for quoting, at this point, the statement made by Lord Denman in *O'Connell* v. *The Queen,* 11 Cl. & F., at page 372:

> "Several Judges, and many barristers and persons in high situations, have expressed the same opinion in the same general terms, and they have taken for granted that it might be truly so stated. And I am tempted to take this opportunity of ob-

serving, that a large portion of that legal opinion which has passed current for law, falls within the description of 'law taken for granted.' If a statistical table of legal propositions should be drawn out, and the first column headed 'Law by Statute,' and the second 'Law by Decision;' a third column, under the heading of 'Law taken for granted,' would comprise as much matter as both the others combined. But when, in pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and restatement of a doctrine—the mere repetition of the *cantilena* of lawyers—cannot make it law, unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle."

The error into which members of the legal profession have fallen can be traced to the failure to observe in those cases the violation of one of the fundamental rules of pleading, which has never been illustrated with better effect than in the case of *State* v. *Mitchell*, 47 W. Va. 789, 35 S. E. 845, where the Court's remarks were as follows (page 790 of the official report):

"Is sawdust a putrid, nauseous, or offensive substance? The indictment alleges that it is, and therefore it may be said that, on demurrer, it ought to be taken to be so; but if we can, by judicial notice, say that it is not so, the allegation that it is will not make it so. 'If a fact which the Court will take judicial notice of be erroneously pleaded, a demurrer does not admit such erroneous statement of fact, but the party filing the demurrer will be entitled to the advantage of the fact, as the Court will judicially notice it.' 11 Am. & Eng. Enc. Law (2d Ed.) 489, note 4. We know that sawdust is a clean substance, coming from the sawing of logs, not putrid, not nauseous, not offensive, even when it has become somewhat decayed, lying in large quantity. The indictment says it is otherwise, but our common knowledge of it denies this. * * *

> If an indictment charge that one, without license, sold water or oil, charging it to be intoxicating, I take it that a Court would say it was not intoxicating, and would not go through a trial to hear evidence on the subject."

An examination of the records in the said cases discloses that the pleadings set forth that the complainants were concerned with the manufacture and sale of liquors which contained about 3% of alcohol by volume, "which liquors were not intoxicating." The statement that the liquor contained 3% of alcohol was a statement of fact, but the further statement of the pleader that, in his opinion, such liquor was not intoxicating, was a mere conclusion, which was not admitted by a motion to dismiss.

The Court cited as its sole authority, in support of the eleventh conclusion, the case of *Ruppert* v. *Caffey*, 251 U. S. 264. We cannot bring ourselves to believe that, by this citation, the Court meant it to be understood that a limited power of enforcement is as extensive as the original and plenary war power. Rather, we prefer to believe that the Court merely meant that since, as appears in the *Caffey* case, eighteen states had by statute defined "intoxicating liquor" to be liquor containing ½ of 1%, or more, of alcohol by volume, and sixteen more had made the test a list of enumerated beverages without regard to alcoholic content, or the presence of any alcohol in a beverage regardless of quantity, the conclusion follows irresistably that when the people and the states prohibited the sale, etc., of "intoxicating liquor," and granted to Congress a power of enforcement, they thereby also granted to Congress permission to use the very same definition of intoxicating liquor which they, the people and the states, had themselves theretofore established. In other words, the decision of this Court was merely that liquor containing ½ of 1% or more of alco-

hol by volume was to be considered "intoxicating liquor" within the meaning of Amendment XVIII.

It has been settled, beyond argument, by the decisions of this Court, that "an unconstitutional law is void and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void and cannot be legal cause for imprisonment" (*Ex parte Siebold*, 100 U. S. 371; *Little Rock & Ft. Smith Ry.* v. *Worthen*, 120 U. S. 97). On the assumption that Sections 3, 6, and 29 are unconstitutional, the defendants could not be convicted of the substantive offenses therein defined, and surely it cannot be maintained that they can be convicted, under Section 37, of an agreement or conspiracy to commit such substantive acts.

Point II.

The National Prohibition Act is unconstitutional in that it prohibits intrastate transactions in intoxicating liquor other than manufacture, sale and transportation, and in that it prohibits intrastate transactions in intoxicating liquor, including manufacture, sale and transportation, for purposes other than beverage purposes.

We shall first prove our point by showing the effect of the amendment upon the police power of the states; then we shall verify the proof by showing the effect of the amendment upon the powers theretofore possessed by Congress.

I.

Before the adoption of Amendment XVIII all police power over intrastate transactions in intoxicating liquor was vested solely in the several states.

A. The police power generally is possessed by the states.

In matters of police regulation there can be no such thing as a divided sovereignty. The jurisdiction must either be vested in the states or in the federal government; it cannot be divided between the two (*Re Heff*, 197 U. S. 488, 506). It is not our object to indulge in a lengthy discussion of the police power, nor to trace its origin back through the Confederation to the original thirteen independent sovereignties. Suffice to say that it has been settled beyond argument that the United States lacks the police power, which was expressly reserved to the several states by Amendment X (*Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156) and that the regulation of intrastate transactions in intoxi-

cating liquors, one of the most common exercises of the police power, has heretofore been exclusively within the domain of state jurisdiction (*Re Heff*, 197 U. S. 488, 505). The original disposition of the power of legislation over the subject of intoxicating liquors conforms to the general scheme of the division of powers between the national and the state governments.

We therefore start with the proposition that formerly the whole of the police power with respect to intrastate transactions in intoxicating liquors was vested in the several states, the United States possessing no share in that power.

B. The police power is not only the power to enact legislation, but is also the power to refrain from enacting legislation.

The police power has generally been defined as the power to enact regulations of a particular kind. Cases which contain such definitions are almost invariably cases in which one party seeks to avoid a statute by asserting that the enactment thereof was not a proper exercise of the police power. In *Richards* v. *Palace Laundry Co.*, 55 Utah, 409, 186 Pac. 439, however, the Court had under consideration an instance, the establishing of traffic regulations, where the legislature had failed to act, and in *Hammer* v. *Dagenhart*, 247 U. S. 251, it was said, at page 273, that

> "there is no power vested in Congress to require the states to exercise their police power * * *."

Silence or the failure to prohibit or regulate is an expression of will that the subject matter be left free from any restriction or regulation (*Robbins* v. *Taxing District*, 120 U. S. 489, 493), but since no one has had the ignorance to suggest that a legislature could be compelled to exercise its police power by affirmative action, courts have not been called upon to define this power in

its other aspect, that of non-action. From its nature, the police power must be not only the power to enact legislation, to regulate or prohibit, but also the power to refrain from enacting legislation, the power to permit complete freedom of action. The keeping of hogs within the limits of a village may be prohibited by the common council in the exercise of the police power. How can it be said that the failure of the common council to prohibit such keeping of hogs is not an exercise of the police power, a decision that such keeping of hogs is not yet dangerous to the health of the community? The decisions holding invalid statutes and ordinances proceed on this theory—the subject-matter forbidden may be within the police power, but public welfare has not yet required its extension to meet that particular condition (12 C. J. 909). In such a case, non-action, and not action, is the proper exercise of the power.

II.

Amendment XVIII prohibits merely the manufacture, sale, transportation, importation and exportation of intoxicating liquor for beverage purposes and does not prohibit, nor grant the power to Congress to prohibit, any transactions in intoxicating liquor except the foregoing five, and does not prohibit, nor grant the power to Congress to prohibit, those five transactions when done for any purpose other than beverage purpose.

A. Section 1 of Amendment XVIII should be restricted to the natural meaning of the words used therein.

It is respectfully submitted that the words of this section need no construction and but little interpretation. The section says plainly and distinctly that:

"After one year from the ratification of this arti-

> cle, the manufacture, sale, or transportation of intoxicating liquor within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited."

The rule of interpretation whereby the intent of the amendment is to be discovered has been admirably stated by Mr. Justice Lamar in *Lake County* v. *Rollins,* 130 U. S. 662, where the learned Justice said, at page 670:

> "Why not assume that the framers of the constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such case, there is a well-settled rule which we must observe. * * * If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it."

A constitutional amendment, before its adoption, must meet with the approval of three-fourths of the states of the Union and it may be assumed that the Congress which framed this amendment had in mind the difficulty of obtaining its ratification. It may be further assumed that, having a complete discretion as to the prohibitions which it would propose to the states for adoption, Congress chose those prohibitions which, after careful thought, it believed would meet with the approval of the greatest possible number. The states, in ratifying the proposed amendment, had before them a plain and unequivocal statement that five certain transactions in intoxicating liquor, when done for beverage purposes, were prohibited. In that statement there was contained no intimation of further prohibitions hidden in ambiguous phrases.

It is not our purpose to discuss the moral right of a government to regulate the conduct of its citizens in certain respects, as that subject has been most ably treated by Mr. Justice Barker in *Commonwealth* v. *Campbell*, 133 Ky. 50, 117 S. W. 383. We may, however, venture a doubt as to the right of the United States to prohibit the use of wine and cordials in sauces, the use of pure and unadulterated alcohol for polishing ivory piano keys and for alcohol rubs, the use of brandy in mince pies, etc. (*Sarrls* v. *Commonwealth*, 83 Ky. 327, 331). The question we are now discussing is, whether or not such uses of intoxicating liquor actually have been forbidden. We submit, however, that the amendment is not the result of a crusade against mince pies, alcohol rubs or piano keys.

Amendment XVIII is the first attempt to limit by a constitutional provision the use and enjoyment of previously acquired property. Amendment XIII merely had the effect of annunciating, in a constitutional provision, an accomplished fact which had already resulted from the Emancipation Proclamation and from a successful termination of the Civil War (*Slaughter-House Cases*, 16 Wall. 36, 68; *Texas* v. *White*, 7 Wall. 700, 728).

Amendment XVIII also infringes, for the first time, upon the hitherto plenary and exclusive police power of the several states. No previous amendment or constitutional provision was intended or could be construed so to do (*Barbier* v. *Connolly*, 113 U. S. 27, 31). Every intendment must be against divesting the sovereignty of a state of any right, privilege, title or interest, even when such divesting is the act of the state itself (*U. S.* v. *Herron*, 20 Wall. 251, 263), and how much more strict should be the rule and its application when the divesting is not the act of the state itself, but is the act of other states, as is the fact with respect to the non-ratifying states.

B. Section 1, according to its natural meaning, prohibits merely the said five transactions in intoxicating liquor when done for a specific, *i. e.*, beverage purpose.

In considering Amendment XVIII, it should first be noted that Section 1 does not contain a grant of power to Congress to do anything. The prohibitions therein contained are self-executing (*National Prohibition Cases*, 253 U. S. 350). This determination of the operation of Section 1 conforms to the former decisions of this Court on previous amendments having the same general form (*Civil Rights Cases*, 109 U. S. 3; *Hodges* v. *U. S.*, 203 U. S. 1; *Guinn* v. *U. S.*, 238 U. S. 347), particularly with those decisions interpreting Amendment XIII, which provides that

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."

We have already seen that the Act prohibits practically every conceivable transaction in intoxicating liquor for any and every purpose, and its validity in prohibiting such transactions must depend primarily upon whether or not such other transactions may be comprehended within the word "sale," as we apprehend that not even the most ardent prohibitionist will contend that a prohibition on a purchase, gift, loan or exchange can be derived from a prohibition on manufacture, transportation, importation or exportation.

A number of cases have arisen which have considered various aspects of the question of whether or not a prohibition on a gift might be derived from a prohibition on a sale, the decisions being in the negative. A case exactly in point is that of *Holley* v. *State*, 14 Tex. Cr. App. 505, wherein the first question before the Court

was the operation of Section 20 of Article 16 of the state constitution, which provided that

> "The Legislature shall, at its first session, enact a law whereby the qualified voters of any county, justices precinct, town or city, by a majority vote, from time to time may determine whether the sale of intoxicating liquor may be prohibited within the prescribed limits."

The Court, speaking through Mr. Presiding Judge White, first held that the above constitutional provision was a limitation upon the power of the legislature to enact legislation, that is, the power was thereafter to be confined within the limits of Section 20. Pursuant to its supposed powers under the constitution, the legislature passed enforcement statutes which prohibited not only the sale but also the exchange and gift of intoxicating liquors. The second question before the Court was, to quote from the opinion (page 509),

> "Are our civil and criminal local option statutes * * * constitutional in so far as they attempt to prohibit the *giving away** of intoxicating liquors within the prescribed bounds where local option has been adopted?"

In deciding that the said statutes were unconstitutional, because the prohibition on gift was beyond the powers of a legislature having only the power to prohibit a sale, the Court said, at page 513:

> "Did the framers of that instrument intend that *a gift** should also be prohibited? It is scarcely possible, or even probable, that they could have done so; for it is but just and reasonable to presume that, had such been the case, they would, when they had the matter in hand, have expressed that intent in language equally as plain and unambiguous in the instrument itself. Construing the instrument by its own terms, it must be clear that its makers never

*Italics the Court's.

intended to prohibit the giving away of intoxicating liquors, or they would have said so in the provision itself when they had the subject under consideration."

The dictionaries, to which we are permitted to refer (*Hodges* v. *U. S.*, 203 U. S. 1, 17), make clear the distinction between these two transactions and many other cases, which have been cited in the brief, also bear on the subject, but we do not deem it necessary to comment upon them.

Property in intoxicating liquors may also be transferred, completely or to a limited extent, by transactions other than sale or gift, such as exchange and loan. Such a case was *Gillan* v. *State*, 47 Ark. 555, where the defendant had been convicted of selling liquor to a minor. The facts were that the minor had given money to a negro who purchased liquor for him, but without disclosing his agency. The liquor was not to the minor's taste and he returned it in person, receiving from the defendant, in lieu thereof, a different brand. The Court reversed the judgment of conviction on the grounds that the statute forbade only the act of selling, saying, at page 557:

> "In *Ward* v. *State*, 45 Ark. 351, we were forced to hold that one who gave liquor to a minor could not be convicted of selling him the liquor under this statute. Quoting, with approval *Seigle* v. *People*, 106 Ill. 89, the court there say: 'We cannot construe the word "sell" in such a statute to mean something different from its ordinary legal import.' An exchange or barter has a different legal import from a sale, as was pointed out by this court in *I. Z. Cooper's case*, 37 Ark. 412, determined under the statute making it penal to sell, barter or otherwise dispose of, mortgaged property."

Other cases, cited in the brief, make clear the distinctions between these transactions.

The distinction between purchase and sale is so well established and so obvious that we do not deem it necessary to devote space to comments thereon.

The cases cited in the brief disclose the fact that many states have annunciated and maintained well defined distinctions between a sale and other legal transactions whereby property is transferred. This situation is exactly the reverse of that which existed in the *National Prohibition Cases*. In those cases, as we have heretofore pointed out, an examination of authority warranted the conclusion that when the states and the people ratified Amendment XVIII they were satisfied to have included within "intoxicating liquor" any liquor within the definition theretofore established by them. An examination of authority discloses the fact, however, that there is not only no authority for imagining that the states and people meant to prohibit purchase, gift, loan and exchange, but, on the contrary, it affirmatively appears that these transactions were not meant to be, nor considered to be, included within the prohibition on sale.

By the provisions of Section 1, all manufacture, sales and acts of transportation are not prohibited, but only such as are for "beverage purposes." The meaning of these words is not hidden beneath a mass of verbiage and speculation as to their meaning is not warranted. Sales for beverage purposes, in the language of Mr. Justice Holmes (then a Justice of the Supreme Court of Massachusetts) in *Commonwealth* v. *Mandeville*, 142 Mass. 469, 8 N. E. 327, are "sales of liquor to be drunk for the pleasure of drinking."

With respect to this prohibition on sales, etc., for a specified purpose, Amendment XVIII is comparable to Amendment XV, which provides that the right to vote shall not be denied on account of race, color or previous condition of servitude. This provision of Amendment

XV is self-executing (*Guinn* v. *U. S.*, 238 U. S. 347, 363), but the prohibition on the denial of the right to vote is not operative except where such denial was on account of race, color or previous condition of servitude. So Amendment XV is not applicable to a denial of the right to vote on account of sex (*U. S.* v. *Anthony*, Federal Case 14459).

State v. *Langdon*, 29 Minn. 393, 13 N. W. 187, is directly in point. That case involved the authority of the common council of a village to issue a license for the sale of liquors for non-beverage purposes. The act of the legislature incorporating the Village of Worthington (Chap. 5, Spec. Laws, 1873, Minn.) provided, in Section 14, that no license for the sale of malt, spirituous or intoxicating liquors *as a beverage* should be granted to any person within such village. Section 16 of the same act gave authority to the common council of the village to restrain any person from vending any liquors "unless duly licensed by the common council." The Court limited the prohibition of the statute to beverage purposes, saying at page 396 of the official report:

> "The law, then, absolutely prohibits the granting of a license for the sale of malt, spirituous, or intoxicating liquors, as a beverage, within this village, and prohibits any sale for such purposes. For other purposes the county commissioner may grant licenses, and so may the village council."

An analogous situation was considered by this Court in *Adams Express Co.* v. *Kentucky*, 238 U. S. 190, wherein there was presented for consideration the Webb-Kenyon Act (Act of March 1, 1913, 37 Stat. at L. 699). This statute, omitting immaterial words, reads as follows:

> "The shipment or transportation * * * of * * * intoxicating liquor * * * from one State * * * into any other State * * * which * * * intoxicating liquor is intended, by any person inter-

ested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State * * * is hereby prohibited."

This Court, speaking through Mr. Justice Day, in commenting upon the statute, said, at page 199:

"It would be difficult to frame language more plainly indicating the purpose of Congress not to prohibit all interstate shipment or transportation of liquor into so-called dry territory, and to render the prohibition of the statute operative only where the liquor is to be dealt with in violation of the local law of the State into which it is thus shipped or transported. * * * Thus far and no farther has Congress seen fit to extend the prohibitions of the Act in relation to interstate shipments."

Finally, therefore, if we may be permitted to adapt to the instant case the language of Mr. Justice Lamar, in *Kidd* v. *Pearson*, 128 U. S. 1, at page 19:

The effect of the amendment, then, is simply and clearly to prohibit all manufacture, sale, transportation, importation and exportation of intoxicating liquors for the one purpose specified. "For the purpose," says the amendment. The specified purpose is all that makes such transactions unlawful.

The effect of Amendment XVIII, then, is to prevent the states from permitting within their respective borders, in the exercise of their police power in the true sense, the manufacture, sale and transportation of intoxicating liquors for beverage purposes. They may still permit, if they see fit, such transactions for other purposes, or other transactions for any purpose. Nothing in the amendment contained gives any warrant for further limiting the police power of the states. The words of the late Chief Justice in *Guinn* v. *U. S.*, 238 U. S. 347, 362, although spoken of Amendment XV, are equally applicable to Amendment XVIII:

"(*a*) Beyond doubt the amendment does not take

away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support and both the authority of the nation and the State would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the State, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals.

(*b*) * * * Thus the authority over suffrage which the States possess and the limitations which the Amendment imposes are coördinate and one may not destroy the other without bringing about the destruction of both."

The power of the states to permit the sale of intoxicating liquor for other than beverage purposes, either unrestricted or under regulation, being coördinate with the prohibition on sale for beverage purposes contained in Amendment XVIII, is it not perfectly obvious that the United States, in enforcing such prohibition, cannot forbid or punish a transaction which the states may permit under and by virtue of their equal power? The residuum of the police power (r) now remaining in the several states is, therefore, the former unqualified power (f) as affected by the prohibitions of Amendment XVIII (p), or phrased algebraically,

$$r=f-p.$$

We admit quite freely that ascertaining the effect of a constitutional amendment by what may be called the subtraction method is more or less novel, but we respectfully submit that it is the proper method to employ in ascertaining what remains of a whole (the police power) after certain parts (the prohibitions) have been taken away.

C. Section 2 grants a mere power of enforcement to Congress which cannot be used to extend the terms of Section 1; any such attempted extension is unconstitutional and void.

We have sought to determine the extent of the power granted to Congress by approaching the question from the standpoint of the effect of the amendment upon the police power of the states. The proposition, having been established as above, may be proved by the more conventional method of approach, that is, by determining the effect of Amendment XVIII upon the hitherto enumerated and implied powers of Congress.

Notwithstanding the adoption of the amendment, the United States remains a government of enumerated powers and any congressional legislation directed against individual or state action which was not warranted before the amendment must find authority in it (*Hodges v. U. S.*, 203 U. S. 1, 16). Whatever power is granted by the amendment is granted by Section 2, not by Section 1. This power is not a broad, general power necessitating investigation and the use of discretion, as is the case with other powers, such as the power to regulate interstate commerce or the power to raise and support armies. Congress has no discretion as to whether the sale, for instance, of intoxicating liquor, shall be prohibited for beverage purposes, nor has it any discretion as to the extent of the prohibition. Section 1, in and of its own inherent force, has prohibited, absolutely and under any and all circumstances, the sale of intoxicating liquor for beverage purposes. Section 2 merely grants to Congress a concurrent power to enact legislation which is appropriate to the enforcement of certain existing enumerated prohibitions. "This is the legislative power conferred upon Congress, and this is the whole of it" (*Civil Rights Cases*, 109 U. S. 3, 11).

This brings us directly to the determination of the meaning of the words "appropriate legislation." We respectfully submit that appropriate legislation must, in the first place, be such as forbids the acts which are prohibited by the amendment, and, in the second place, must be limited in its scope to the acts so prohibited, that is, must not prohibit other acts which are not prohibited by the amendment. The usurpation of a plenary and original sovereign power under the mask and guise of a carefully limited power of enforcement is not to be tolerated.

In the *Slaughter-House Cases*, 16 Wall. 36, an attempt was made to bestow upon the United States a discretionary power under the guise of a power of enforcement. The Court, speaking through Mr. Justice Miller, said at page 77:

> "Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States*,* to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?
>
> All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction would constitute this court a perpetual censor upon all legisla-

*Italics the Court's.

tion of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment."

In *U. S.* v. *Cruikshank*, 2 Otto 542, at page 555, the following language was used by Mr. Chief Justice Waite in speaking of the self-executing prohibitions of Amendment XIV:

> "The only obligation resting upon the United States is to see that the States do not deny the right (to an equal protection of the laws). This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty."

Under the enforcement provision of Amendment XIV, Congress attempted to launch itself upon a career of unrestricted legislation in what was then, as is now the case under Amendment XVIII, regarded as a highly moral field. The Court met this situation in the *Civil Rights Cases*, 109 U. S. 3. It was there decided that that amendment did not invest Congress with power to legislate upon subjects which the self-executing prohibitions of the amendment left untouched. If Congress, under that amendment, could not create a code of municipal law for the regulation of private rights, how can it be said that, under this amendment, it can create a code of municipal law for the regulation of the traffic and use of intoxicating liquor? It is true that Amendment XVIII, unlike Amendment XIV, also operates upon the individual citizen and in this respect resembles Amendment XIII, but it is also true that, as to its effect upon the states, Amendment XVIII has exactly the same effect as if it were phrased:

> Section 1. No state shall permit, within its boundaries, the manufacture, sale or transportation of intoxicating liquor for beverage purposes.

Section 2. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The cases arising under Amendment XIII are directly in point. Section 1 of that amendment operates not only upon the individual but also upon the states, in that the states may no longer, in the exercise of their power to further the welfare of their citizens, permit and legalize slavery or involuntary servitude within their respective boundaries, except by way of punishment for crime.

In the *Civil Rights Cases*, 109 U. S. 3, an attempt was made to support the constitutionality of a statute providing for the equal rights of persons of color in hotels by asserting that Congress, under its power to enforce the prohibitions of Amendment XIII, had power to enact the statute in question. The Court said, however, speaking through Mr. Justice Bradley (page 20):

> "It is true, that slavery cannot exist without law, any more than property in lands and goods can exist without law: and, therefore, the Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States. * * * Conceding the major proposition to be true, that Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents, is the minor proposition also true, that the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance, or a theater, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery? If it does not, then power to pass the law is not found in the Thirteenth Amendment."

The Court thereupon decided that the enforcement power of Congress could not be extended to embrace the subject-matter of the statute.

We come now to a consideration of the proposition assumed for the purpose of argument in the above excerpt, namely, that the power vested in Congress to enforce the prohibitions of Section 1 by appropriate legislation, clothes Congress with power to enact all legislation "necessary and proper" to prohibit intrastate transactions in intoxicating liquor other than manufacture, sale and transportation, and to prohibit any transaction irrespective of purpose, whether beverage or non-beverage. It is submitted that no decision or even dictum of this Court, including the above excerpt, can be found which gives countenance to any such legal theory.

The proposition now to be considered is an attempt to apply the doctrine of implied powers annunciated by Mr. Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, at page 421, to wit:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."

This doctrine has its origin in the last sentence of Section VIII of Article I of the Constitution, to wit:

> "Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

Examining that sentence, we notice that the power must be one to carry into execution another power. In other words, it must be an *ancillary* power. It is not permissible to imply powers right and left, to create original

powers out of whole cloth. Before a resort can be had to the above quoted part of Section VIII, the original or major power must exist. Then and then only, may the ancillary power be implied and brought into operation.

Applying these principles to the instant case, what is the original and existing power conferred upon Congress by Amendment XVIII? The power to enact appropriate legislation, that and nothing more.

The cases which apply the doctrine of ancillary powers, as we prefer to call it, are all cases wherein a broad, general power was involved, such as the powers enumerated in the major part of said Section VIII—the power to regulate interstate commerce, to raise and support armies, etc. In the exercise of these powers, discretion is involved. Congress may, in the first instance, decide either to do or not to do a certain thing, as, to regulate interstate commerce. Having decided to regulate commerce, it may proceed to act within certain limits. Those limits are the limits of the original power and the ancillary power, by whatsoever name it be called, may not be brought into operation to extend those limits.

In *Keller* v. *U. S.*, 213 U. S. 138, this Court had under consideration a statute which provided that

> "Whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, shall, in every such case, be deemed guilty," etc.

This statute was held unconstitutional, the Court, speaking through Mr. Justice Brewer, saying at page 148:

> "That there is a moral consideration in the special facts of this case, that the act charged is within the scope of the police power, is immaterial, for, as stated, there is in the Constitution no grant to Con-

gress of the police power. And the legislation must stand or fall according to the determination of the question of the power of Congress to control generally dealings of citizens with aliens. In other words, an immense body of legislation, which heretofore has been recognized as peculiarly within the jurisdiction of the States, may be taken by Congress away from them. Although Congress has not largely entered into this field of legislation, it may do so, if it has the power. Then we should be brought face to face with such a change in the internal conditions of this country as was never dreamed of by the framers of the Constitution. While the acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced. *Fairbank* v. *United States,* 181 U. S. 283. To exaggerate in the one direction and restrict in the other will tend to substitute one consolidated government for the present Federal system. We should never forget the declaration in *Texas* v. *White,* 7 Wall. 700, 725, that 'the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states'."

In *Hammer* v. *Dagenhart,* 247 U. S. 251, this Court had before it a statute which prohibited the transportation in interstate commerce of manufactured goods, the product of a factory in which, within thirty days prior to their removal therefrom, children under fourteen were permitted to work. The act also contained other provisions as to children between fourteen and sixteen. This statute, also, was declared unconstitutional, the Court, speaking through Mr. Justice Day, saying, at page 273:

> "The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.
>
> The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution."

The persistence of Congress in legislating for the benefit of citizens in a purely local matter resulted in an attempt to pass another child labor law under the guise of a tax law. This was also held unconstitutional in *Bailey* v. *Drexel Furniture Co.*, No. 657, decided May 15, 1922. The remarks of the Chief Justice therein are very pertinent to the instant case:

> "The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards. In the maintenance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half."

Such, indeed, is the case with the Prohibition Act. The argument that this legislation is unconstitutional, because in breach of state and private rights, provokes from many good citizens the same casual shrug of detached interest that the bootlegger gives when informed that his trade is in violation of the Constitution.

We have seen that limitations exist where there is involved a complete power which embraces the entire field, and surely they cannot be ignored when the power embraces merely a small, fractional part of the field.

The theory of ancillary powers is not applicable to a power to enforce self-executing prohibitions, nor is it adapted to any such application, but this Court will undoubtedly be requested in this case to take up this theory and by means thereof extend the amendment to cover the entire conceivable field, and the excuse which will be given to persuade the Court to take this step will be that Amendment XVIII is the law and "the law must be enforced." It is under such sophistry as this, without con

sidering the nature of the law, or the proper limitations which must ever exist in the exercise of power, that the most cruel and despotic acts of persecution have been defended.

We do not mean to contend that Congress must be confined to the exact wording of the amendment, but we may be permitted to suggest that the proper method by which to meet the enforcement situation is not by wrenching the Constitution, nor by seeking to extend and apply a doctrine which was never intended so to be applied and which in and of its very nature is not applicable. Congress, we submit, should apply to violators of Section 1 of the amendment the identical principle which should be applied to the exercise by Congress of its powers under Section 2, namely, that which cannot be done directly, cannot be done indirectly or by way of subterfuge. Let Congress enact a statute which first prohibits and penalizes a sale, for instance, for beverage purposes; which then prohibits and penalizes a sale under the guise of a gift, loan, exchange or other transfer; which then prohibits and penalizes a sale for beverage purposes under the guise of a sale for non-beverage purposes. Such a statute would sufficiently and adequately enforce the prohibition on sale for beverage purposes without infringing either upon the power of the states to permit, with or without regulations, the sale for non-beverage purposes, or the right of the individual, derived from the permission of a state, to sell for non-beverage purposes. Such a statute as that outlined above will not, we fully appreciate, content those in whom reformatory tendencies have run riot, nor yet those who are satisfied with nothing less than dictatorial powers over the likes and dislikes of their fellow men. The amendment, however, must be enforced within the limits ordained by the many, not within the boundless expanse wished for by the few.

At this point, we inevitably meet the argument that intoxicating liquor is a commodity of such annihilating force that the situation, from a "practical standpoint," demands that some must be sacrified in order to save many. In the first place, that proposition is contrary to fact—it is the rights of the temperate many which it is sought to subordinate to the saving of the inconsequential drunken few. In the second place, assuming the proposition to be true, the argument as to the necessity of sacrificing the rights of the individual to the mass is rapidly approaching the point of being run into the ground. The establishing of mass equality, the establishing of political equality between ruler and ruled, has not been the end and aim of the long struggle for liberty. An analysis of history and of the provisions of our own Constitution negative any such idea. The essential element in liberty, without which liberty is a mere empty sound, is the privilege of nonconformity in those matters which affect only the private life of the individual. Conformity is the antithesis of individuality, and this nation was founded by individualists, not by conformists. It is an historical fact that the more primitive and backward a race is, the more nearly its members conform to a single type, having the same religion, the same thoughts, eating the same food, doing the same things in the same ways. Progress comes only when individuals are permitted to have different thoughts, to do different things, to do any given thing in different ways—in short, to possess individuality. Racial and sectional antipathies are founded mainly upon dislikes caused by primitive-minded inability to tolerate differences in habits, customs or appearances. Although the selling argument of all professional hawkers of reform is that the world will be made a better, cleaner, sweeter place to live in by the abolition of whatever it is they are trying to abolish,

we nevertheless maintain that seeking to impose upon others one's own ideas in matters which do not affect society injuriously is not an indication of advanced thought, but is the hallmark of a brain which is fairly primordial in its intellectual limitations.

The people of the United States, as they have heretofore existed and as they exist today, have certain differences in dress, dialect, habits and customs.

> "No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass." (Mr. Chief Justice Marshall, in *McCulloch* v. *Maryland*, 4 Wheat., at 403.)

These words, though spoken in another connection, have an application here. When differences in habits and customs exist, the privilege of enjoying, of possessing, of retaining such differences, in other words, the privilege of nonconformity, whether in the individual or the community, makes for contentment and minimizes the possibility of friction. Well has John Stuart Mill said in his essay "On Liberty,"

> "No society in which these liberties are not, on the whole, respected, is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily or mental or spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest."

When, however, the individual or the community is ordered under penalty to refrain from a harmless course of conduct in order to conform to the ideas of some other individual or community, then government becomes op-

pressive and a feeling of resentment is aroused—then may citizens well say,

> "the iron yoke of outward conformity hath left a slavish print upon our necks."

That is exactly the situation which exists today with respect to the enforcement of prohibition, which, it is a fact of common knowledge, has aroused feelings that range from anger to disgust. For the first time in the history of this nation a provision of our Constitution has failed to retain the support of the public. The Prohibition Act serves as the butt of jokes and witticisms; it has been denounced by churchmen from the pulpit; it is treated with cynical disregard by substantial citizens of standing. Why? In the first place (it is our belief), the people, who permitted their legislatures to ratify Amendment XVIII, believed it to be aimed solely at the saloon, an institution pecular to American life which no one cares to defend. They now find that it is impossible to acquire intoxicating liquor to be used in the home for beverage purposes. Whether or not this belief be true, no one can say. We have only the words of the amendment before us and they are perfectly plain.

In the second place, however, and in this we are supported by authority, they did not intend to prohibit or restrict non-beverage uses. Never did it enter their heads that, under the operation of an enforcement law, the invalid would be deprived of the cooling effect of a pure alcohol rub; that the household would be deprived of its mince pies, its brandied fruits, its sauces; that the individual would be forbidden to purchase whiskey to keep in his home as a household remedy, but would be forced to wait until he was actually sick, then to search for a doctor who had taken out a permit to prescribe intoxicating liquor, then to search for a druggist who had taken out a license to sell. All these things and more result

from the statute now under consideration. The housewife and the invalid, the substantial and otherwise law-abiding citizen, persons of moderate means who were unable to purchase and store away stocks of liquor, are driven by this law straight into the awaiting arms of the bootlegger with his deleterious concoctions. No one may sell intoxicating liquor for the abovementioned non-beverage purposes—except the bootlegger. No one may buy—except by becoming a party to the bootlegging trade. Can it be a cause for wonder that this enforcement program lacks the moral support of citizens from whom such support should naturally come?

We realize that, by a process of *post hoc* reasoning, every evil to which the human race has ever been subjected has been blamed upon intoxicating liquor. Much of this abuse has been proved to be unfounded, and in this connection we beg leave to refer the Court to an illuminating article in the February, 1921, number of "The North American Review" by a distinguished alienist, Dr. Pearce Bailey, upon which we will not pause to comment.

We further realize that, in defending the use of intoxicating liquor, even for non-beverage purposes, we are on dangerous ground. It is not fashionable to do so, and we have been admonished by Mill that

> "The man * * * who can be accused either of doing 'what nobody does,' or of not doing 'what everybody does,' is the subject of as much depreciatory remark as if he * * * had committed some grave moral delinquency."

The defense, however, is made and it is placed squarely upon the truth that the prosperity and greatness of the nation and the welfare and contentment of its citizens depend upon a division of authority between nation and state, upon a sharp demarcation of that line over which neither nation nor state may trespass.

Recurring to the subject of "appropriate legislation," however, let us, as did the Court in the *Civil Rights Cases*, assume, for the purpose of argument, that "the major proposition" is true; that Congress has acquired, by some process, known or unknown, the power to pass all laws and to do all things necessary, proper or convenient to carry into effect the prohibitions of Section 1, and that Congress may do so whether or not its action infringes upon the police power of the states or upon the rights of the individual derived from the states. That being assumed, the Act is, nevertheless, unconstitutional unless the use of intoxicating liquor for the non-beverage purposes therein prohibited has a real and substantial tendency to result in a use for beverage purposes.

In *City of Jacksonville* v. *Chicago & Alton R. Co.*, 274 Ill. 152, 113 N. E. 91, the Court had under consideration an ordinance reading as follows:

> "It shall be unlawful for any express company, railway company or other common carrier, or for any person, to bring into or to deliver to any person within the city of Jacksonville any intoxicating liquor."

City councils were authorized by paragraph 46 of Section 1 of Article 5 of the Cities and Villages Act (Hurd's Rev. St. 1915-16, c. 24, sec. 62) to license, regulate and prohibit the selling or giving away of any intoxicating, vinous, malt, spiritous or fermented liquor; by paragraph 59 to prevent intoxication; by paragraph 66, to regulate the police of the city and to pass and enforce all necessary police ordinances; and, by paragraph 98, to pass all ordinances and make all regulations proper or necessary to carry into effect the powers granted cities or villages.

The defendant was clearly guilty of violating the ordinance, but pleaded that it was void, and the trial court

so held. In affirming the judgment, the Court, speaking through Mr. Justice Dunn, said at page 335 of the official report:

> "The authority which the legislature has conferred upon cities is to prohibit the sale of intoxicating liquors and to prevent intoxication. While this grant carries with it the power to adopt ordinances reasonably necessary for the purpose it does not confer power to destroy property rights. It is true that if there are no intoxicating liquors in the city there will be no intoxication. The same paragraph which authorizes cities to prevent intoxication authorizes them to prevent dog-fights. If there are no dogs there will be no dog-fights, but probably it would not be claimed that the power to prevent dog-fights authorized the prohibition of the keeping of a dog within the city or bringing one in."

It would seem plain that the mixing of liquor with mince meat or the rubbing of pure alcohol upon the body not only has no tendency to result in a beverage use, but, in fact, makes such a use absolutely and physically impossible. The whole thing comes merely to this—some individuals may purchase intoxicating liquor for a non-beverage use and, instead of so using it, may drink it; therefore, to make the crime less easy to commit, the entire temperate and law-abiding population of the country must be unduly restricted in its rights and privileges. We respectfully submit that this is carrying to an unbearable extreme the proposition of "no dog, no dog-fight."

III.

The National Prohibition Act, being unconstitutional, cannot be saved by striking out objectionable parts or by inserting limitations.

We submit that the Act, as it now stands, is unconstitutional. It remains to be seen whether the Court can

save it by striking therefrom objectionable prohibitions, such as the prohibition on purchase or gift, and by reading into the Act, wherever necessary, expressions which will restrict its prohibitions to beverage purposes.

The statute is an exercise by Congress of three different powers, to wit: (1) the power to legislate for the District of Columbia and the territories, (2) the power to regulate and control importation, exportation and interstate commerce, and (3) the power to enforce the self-executing prohibitions of Amendment XVIII.

In the *Employers' Liability Cases*, 207 U. S. 463, the contention was squarely raised that the Court should insert words of limitation where none existed. The statute in question (34 Stat. at L. 232) provided:

> "That every common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several states, * * * shall be liable to any of its employees * * * for all damages which may result from the negligence of any of its officers * * * or by reason of any defect or insufficiency due to its negligence in its cars * * *."

After deciding that the statute was unconstitutional because it not only regulated the interstate but also the purely intrastate business of the employer (page 492), the Court then considered whether or not a limitation could be inserted restricting its operation to purely interstate commerce. It was decided that this could not be done for the reason that the statute, as it stood, was valid as to the District of Columbia and the territories; that to so qualify its operation was to restrict and destroy its operation as to the District of Columbia and the territories, or, in the language of the late Chief Justice (then Mr. Justice White), at page 501,

> "To write into the act the qualifying words, there-

fore, would be but adding to its provisions in order to save it in one aspect, and thereby to destroy it in another; that is, to destroy in order to save and to save in order to destroy."

The Act, as it now stands, is valid as to those jurisdictions wherein the power of legislation of Congress is plenary, and as to those acts, such as importation and exportation, over which the power of Congress is plenary. To eliminate the prohibition against gift or delivery is to save the Act for application within the states, but to destroy it as to the District of Columbia and the territories. So also as to implying a limitation, writing into the statute after every prohibition the words "for beverage purposes."

The contention made in the *Employers' Liability Cases* has been made in other cases, but in a slightly different way. It has been contended that although the statute was unconstitutional as regards some, it could, nevertheless, be enforced as against others. That is, that although the Act is unconstitutional in that the broad prohibition on sale contained in Sections 3 and 6 and the penalty imposed by Section 29 on any sale in violation of Title II were beyond the powers of Congress to enact, nevertheless, the prohibition and the penalty may be applied to a sale which is actually for beverage purposes.

In *U. S.* v. *Reese*, 2 Otto 214, the statute in question (Act of May 31, 1870, 16 Stat. at L. 140) prohibited and penalized an election official who, under certain conditions, refused to receive and count the vote of a citizen. Another section provided for the punishment of anyone who, in short, deprived a citizen of his vote by force, threats, etc. Neither section limited its operation to acts which were violative of Amendment XV. The Court declined to read into the statute the required words of limitation. The language of the sections was broad enough

to comprehend within its terms the acts prohibited by the natural meaning of the words employed therein, if Congress had had any power to punish such acts, and no attempt was made to provide specifically for the offenses which Congress did have power to punish. The Court, speaking through Mr. Chief Justice Waite, said, at page 221:

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. * * *
>
> To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

James v. *Bowman*, 190 U. S. 127, was an appeal from a judgment granting a writ of habeas corpus to a person who had been indicted for bribing negro voters to refrain from voting, in violation of Sec. 5507 R. S. That section read as follows:

> "Every person who prevents, hinders, controls, or intimidates another from exercising, or in exercising the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment to the Constitution of the United States, by means of bribery or threats, shall be punished as provided in the preceding section."

The indictment charged that the persons bribed and intimidated were negro voters and that the election was held in a certain congressional district and was to elect a representative to Congress, but no allegation was made that the bribery was because of race, color, or previous condition of servitude. In affirming the judgment, the

Court, speaking through Mr. Justice Brewer, said, at page 139:

> "But the contention most earnestly pressed is that Congress has ample power in respect to elections of Representatives in Congress; that the election which was held, and at which this bribery took place, was such an election; and that therefore under such general power this statute and this indictment can be sustained. The difficulty with this contention is that Congress has not by this section acted in the exercise of such power."

And again, at page 142:

> "The limits of its (Congress') power are in respect to elections in which the nation is directly interested, or in which some mandate of the National Constitution is disobeyed, and courts are not at liberty to take a criminal statute, broad and comprehensive in its terms and in these terms beyond the power of Congress, and change it to fit some particular transaction which Congress might have legislated for if it had seen fit."

An exactly parallel case exists with reference to the Prohibition Act. Congress has not pretended to prohibit and punish sales, for instance, for beverage purposes, but it has made the offense any sale in violation of the provisions of Title II. The result is a "drag-net" statute which the Court is invited to reconstruct and rewrite in such a way that it shall be not only *valid* legislation, but also *the* legislation which Congress would have enacted if it had confined itself within its constitutional powers.

In *U. S.* v. *Dewitt*, 9 Wall. 41, this Court had before it a statute (Act of March 2, 1867, Sec. 29, 14 Stat. at L. 484) which prohibited, among other things, the mixing for sale of naptha and illuminating oils, and the selling or offering for sale of such a mixture. The second question certified was whether or not the said section was constitutional. After deciding that such a statute was a police

regulation, the Court answered the question in the negative, except so far as the section operated within the United States, but without the limits of any state. In other words, the Prohibition Act, as it stands, is valid as to the District of Columbia, the territories and the Indian country and should be restricted in its operation to those places.

To recapitulate briefly, Amendment XVIII, by its self-executing provisions, prohibits but five transactions in intoxicating liquors, and those five only when done for a specific, to wit: beverage purpose.

On the analogy of the cases under Amendments XIII, XIV and XV, Congress acquires a power of enforcement which must be restricted within the scope of the self-executing prohibitions.

Congress cannot, under the guise of the enforcement power, infringe upon the police power of the states and assume the power to legislate upon matters which have been expressly reserved to the states by Amendment X and which have never been granted to Congress. Such usurpation, if permitted, would result in the absorption by Congress of the police power by means of gradual encroachments, for the reason that a power in Congress to prohibit a non-beverage use would, if it existed, immediately become superior to the power of the states to permit such use.

No necessity exists for the assumption by Congress of the power to legislate with respect to transactions other than the five prohibited by the amendment, or with respect to them when done for non-beverage purposes, for the reason that the power of Congress to penalize the said five transactions for the prohibited purpose, under whatsoever guise they appear, is ample to enforce the terms of Section 1 of the amendment, and the states still have

the power to regulate all transactions but the said five and all purposes but beverage.

The Act, being broader in its scope than the amendment, is therefore unconstitutional and cannot be saved by any process of construction.

We, therefore, respectfully submit, that, since the plaintiffs in error can never be convicted under this indictment, the judgments of conviction should be reversed and the cause remanded with directions to dismiss the indictment.

Point III.

Errors predicated upon the fact that the trial court entertained an erroneous theory of the case, resulting from a failure to appreciate that the question of fact in the case was limited to the identity of the perpetrators of an admitted crime.

I.

The erroneous theory entertained by the learned trial court and by the government.

The trial of this case proceeded upon an erroneous theory. The theory entertained by the learned trial court was that the approvers were exactly like other witnesses and could be attacked to no greater extent.

This theory made its first appearance, on the trial, when the defense was restricted in its investigation of the liquor activities of the approver Mickey Frank, and was forced to remain content with the admission of the witness that he had once sold liquor. The theory likewise made its appearance when the defense was not permitted to show that Miller had previously brought a carload of whiskey to Chicago, when it was not permitted to disclose other liquor deals of Joy and Miller and when it was not permitted to inquire into Joy's negotiations with witnesses. The theory appeared again when the defendants were not permitted to prove a variance. This theory also showed itself in the charge to the jury, when the court declined to charge the jury on the theory of the defense; declined to give the requested instruction on accomplices, while the charge which the court did give to the jury on the matter of accomplice testimony was insufficient and erroneous; and gave an affirmative instruction which misdescribed the charge in the indictment.

The foregoing errors have been specified in detail at pages 12 to 16 hereof.

II.

The case should have been tried on the theory that Joy et al. were, in effect, on trial to the same extent as the defendants, and the defendants should have been permitted to prove that the approvers were the real culprits.

A. The theory of the defendants was that Joy and the rest of the approvers were the guilty parties and were trying to shift the crime onto the defendants.

When the prosecution contended that Heitler, Perlman and Greenberg brought the car to Chicago, the defense answered that Joy and Miller were the guilty parties. So also the defense contended that it was not Heitler, Perlman and Greenberg who were directing the trucks around 63d street, but Joy and Miller; that it was not Heitler who led away Sergeant Judge and bribed him, if any bribe were given, but Joy himself; that it was not Greenberg who was checking at the car, but Joy; that it was not Heitler, Perlman and Greenberg who sold the liquor, but Joy and Miller. The defense contended, in short, that the entire story of the approvers was invented, so far as concerns the defendants, in order to win immunity and to get revenge, in which the approvers seem to have been entirely successful.

Cases involving approvers as witnesses may be divided into two classes, to wit:

(1) Those in which the prosecution admits that the approvers committed fact "A" and contends that the defendants committed fact "B." The defendants contend that fact "B" was never committed, or if it was committed, that someone other than they committed it, no attempt being made to charge the approvers with fact "B."

(2) Those in which the prosecution admits that the approvers committed fact "A" and contends that the defendants committed fact "B." The defendants admit the commission of fact "B," but contend that the approvers, and not they, are guilty of the commission thereof.

Thus, in cases of the first class, aside from promises of immunity, the questions would be exactly the same were the witnesses not approvers. An example of such cases, assuming federal jurisdiction, would be a conspiracy between the approver, a woman, and the defendant, a man, to commit the crime of rape. The approver is admitted to have enticed the victim to the place of the commission of the crime, and fact "B," the act of rape, if committed at all, must have been committed by the defendant.

But in cases of the second class, the sole inquiry is, *who* committed fact "B"? An example of such cases is where the approver, a man, is admitted to have enticed the victim to the appointed place and the defendant, a man, is accused of the actual rape. The defense is, that having so enticed the victim, the approver also committed fact "B," the actual rape. The issue to be tried by the jury is, not whether fact "B" was committed, but who committed it.

The following general observations may be made upon cases of the second class:

(1) The approvers do not have to invent much of the story. They can tell the truth, the facts as they actually occurred, except that wherever, in a truthful narrative, the names Joy and Miller would be used, they must substitute Heitler, Perlman and Greenberg.

(2) Cross-examination, the great protection against mistaken or perjured testimony, is practically worthless, because the witness *is actually telling the truth*, except for the mere substitution of names.

(3) Cross-examination, if of any value, is restricted to minor details which might not impress the jury. Thus, Joy and Miller both agree that Ambrosi had $2,780 which eventually got into the hands of Perlman. Joy states two different routes over which the money travelled, while Miller adds a third. The practiced eye sees that here is a place where the substitution of names is not enough. The approvers must *invent* something, a minor something which they probably had not thought of before. From the nature of the case, however, the very things which stamp upon their testimony the mark of perjury, are inconsequential in the eyes of the jury. What layman, in the face of the agreement on the ultimate fact, that Perlman got the money, is going to remember that the approvers contradicted themselves and each other on *how* he got it?

(4) Practically the sole defense of the defendants is an affirmative one. They cannot rely upon a failure of proof. They must convince the jury, upon the entire evidence, that the approvers, and not they, committed fact "B." Hours of instructions on the burden of proof and the presumption of innocence will not remove from the mind of the layman the desire to have answered this question—if the defendants did not commit fact "B," who did?

We apprehend, however, that it is not permissible merely to have a theory. We understand the cases to be to the effect that the theory must find support in the facts before it can be urged. Before discussing the legal points involved, the first inquiry must be, do the facts in the record lend support to the theory of the defense? Because if they do not, a discussion of legal points is of no avail.

B. The facts in the record, as made by the government, support the theory of the defense.

We forbear to reiterate the inconsistent statements of the approvers as these have been sufficiently set forth in the appendix. These inconsistencies and self-contradictions in subordinate facts, in and of themselves, are sufficient to point to a perjured tale. In considering this point, we do not ask the Court to believe or even to consider the testimony of the defendants themselves or their witnesses, for we are satisfied that the prosecution itself has introduced sufficient evidence to point to Joy and Miller as the arch-conspirators. The record first discloses these facts: Not a single word or document exists in this case which implicates the defendants, except the words of approvers. No attempt whatsoever was made to impeach a single witness for the defense. Not one word exists in this record to show that Mandel Greenberg was even thought of as being implicated until one and a half months after the commission of the crime. Not one drop of this liquor was traced to either Heitler, Perlman, Greenberg, McCann or Quinn, nor was a single truck traced to them, although the government was in possession of the license numbers of all the trucks which hauled liquor from the car (Rec. 98) and by means of a license number taken by Koeller (Rec. 98), a second-hand dealer in automobiles (Rec. 153), an attorney (Rec. 154), an investment company (Rec. 154, 157), two banks and a telegram from the Secretary of State (Rec. 158), the government found out that one of the trucks at the car belonged to the son of, and had been paid for by, the defendant O'Leary; and by a process of working from another license number (Rec. 98), to the truck driver (Rec. 156) and into an apartment by means of a search warrant, the government discovered therein, on the premises of the co-defendant McGovern, certain remnants of cases and

certain pints of the whiskey here involved (Rec. 158-9). The above facts, or absence of them, while sufficient to cause a reasonable doubt as to the guilt of the defendants, may not, however, point affirmatively to the approvers as the perpetrators of the crime.

Other facts adduced by the government do, however, appear which point affirmatively to Joy and Miller. Such is the alleged arrangement Joy made with Heitler, Perlman and Greenberg on Saturday, whereby Joy and Miller were to be paid back their money, fifty per cent in cash on Monday and fifty per cent in liquor a few days later (Rec. 126).

According to his story, Joy was given the telephone numbers of Perlman and Heitler and was instructed to call them up "if anything happened during the night" (Rec. 126). On Saturday afternoon, looking forward, what was it that was expected to happen during the coming night? The record gives no clue. But at the time of trial, looking back to the events of Saturday evening or early Sunday morning at the Englewood station, much had happened that night and what more natural than that Perlman should now be credited with a prescience which he modestly disclaims? But Joy went to bed perfectly satisfied that he would get his money (Rec. 128). When Miller called to take him to see the police, did he do the natural thing and call up Perlman or Heitler? He did not. When he met Heitler in the Englewood station, did he do the natural thing and attempt to evade until he got a chance to talk with Heitler? He did not. The sight of Heitler was the signal for a volley of curses and vilification (Rec. 128). Is that an act of a man who had just made an arrangement to get back $20,000? Joy's sole ambition at that time was to get back his money. He would have taken it as he sat on the witness stand if it had been offered him (Rec. 132). Would he have jeop-

ardized this "arrangement" without ascertaining if Heitler had backed out? The answer is obvious. More remarkable still, however, is the fact that *Joy never said* a word to Miller about this "arrangement," whereby these two were to get their money back (Rec. 149).

The threat of death by Heitler to Frank is merely the conventional touch of local color. To expect us to believe that Heitler really drew his finger across his throat in a room ten feet square, in the presence of several police officers, is to presume too much upon our credulity.

Miller said that he saw Heitler's machine, which was a Hudson (Rec. 257), near the car at Gresham. Miller's machine was there and he admits it (Rec. 144). By substituting Heitler for Miller, the ultimate fact is established—Heitler's machine was there. But how did he know it was Heitler's, except by observation? He observed closely enough to see the ultimate fact, the ownership of the machine, but this dealer in second-hand automobiles, perfectly familiar with a Hudson, could not recognize the make of this particular Hudson (Rec. 150). If he had in fact seen that machine there that night, he must have noticed what kind it was.

It is to be noted that the two Franks testified to many meetings with Perlman, Heitler and Greenberg, but at none of these meetings does anything appear to have been said, nor do the several gentlemen standing at Mickey's bar, in whose presence Heitler and Mickey discussed hundreds of cases of whiskey, appear to have evidenced the least bit of interest or enthusiasm over this shipment, nor to have inquired as to the possibility of their finding solace in a few pints thereof (Rec. 106). We suggest that the reason the two Franks testified that nothing was said was that they were unable to invent fictitious conversations. We are expected by these approvers and by the contentions of the government to be-

have many highly improbable things. One thing, however, which we are asked to believe is absolutely impossible of occurrence—and that is, that four gentlemen, by name Morris Frank, Michael Hattler, Nathaniel Perlman and Wendel Greenberg met; that one of them delivered $7,000 in cash to another, told him that that was all he was going to get, and not a word was said by any of the other three (Rec. 112).

Against testimony of the kind above described, the defendants have some measure of protection in cross-examination, subject, however, to the limitations hereinbefore mentioned, *i. e.*, the contradictions will not be as to the ultimate fact, the payment of money, but will be to what may appear to be minor details, how, when, to whom the money was paid.

Where, however, no more is required of the appellees than a mere substitution of names, what protection does cross-examination afford? Joy said that Hattler led Judge away from the car (Rec. 156). Can it be expected that he will, on cross-examination, admit that it was he, and not Hattler, who committed the act, or can Judge be expected to take the stand and testify that it was Joy who bribed him, if a bribe were given, and not Hattler? Other facts exist, however, which show that it was Joy and not Hattler. Kestler said on direct examination that the man who led Judge away wore a diamond pin and ring (Rec. 96.) Joy admits wearing these articles of jewelry (Rec. 159). Was it Joy, who was never brought before Kestler, or was it Hattler, whom Kestler failed to recognize? (Rec. 103).

Joy and Miller said that Hattler, Perlman and Greenberg were directing the trucks around Gill street, while Joy remained several hours waiting beside his truck (Rec. 158, 166). But Greenwell, the truck driver, said that Joy went off immediately upon his arrival and was

not seen again for several hours (Rec. 139). Where was he? Where, but at the rendezvous giving directions?

Joy testified that Heitler said he had Louisville whiskey and expected a carload every week (Rec. 123). Who gave Andreoni a receipt for his money? *Joy* and *Miller* (Rec. 124, 127). *Joy* and *Miller* purchased those twenty cases from Heitler, Perlman and Greenberg at $130 per case or for $2,600 in all (Rec. 123). They were sold to Andreoni for $2,790 (Rec. 124), a profit of $190. Can anything be more silly than Miller's excuse for giving the receipt? (Rec. 150.) "He had so much confidence that the deal was on the square that he had no hesitancy in obligating himself to make good any loss Andreoni sustained." In the presence of the alleged real sellers, Miller, for $190, obligates himself to pay out $2,790, if anything went wrong.

Consider also the testimony of Greenwald. *Joy* told him that he, *Joy*, had a carload of whiskey coming and that he had a permit to haul it (Rec. 141). Why should *Joy* say that he had a carload and a permit? Why, if it were not a fact that he did have both? It should be remembered that this statement was made to Greenwald *before* the holiday, and *before* there was any necessity that *Joy* find a scapegoat in order to win immunity for himself.

Joy said that he made the deal in Perlman's saloon. Why did he brazenly deny knowing the whereabouts of Adolph Georg's saloon (Rec. 121), although he was immediately forced to admit that he frequented it? Mickey Frank *gives* the answer. When Mickey Frank went to Perlman's on Saturday, he went down two steps (Rec. 151). Mickey Frank did go to Perlman's on Saturday, but he first went down two steps, which is how one enters Adolph Georg's (Rec. 151), Manny Joy's hangout (Rec. 151, 147). Why did Mickey Frank completely contradict

on the trial the statement he made to Captain Ryan? Why was Friday a more propitious day than Thursday? Why did he "forget" $500 and five cases? Nobody knows but Frank.

Morris Frank admits one sale of ten cases (Rec. 102), but Harry said, speaking of the purchase of 100 cases, that Morris had never bought that much *before* (Rec. 117); Greenguard, a thirty dollar a week waiter (Rec. 119), took $3,250 from a safe deposit vault to "invest" in liquor (Rec. 120); Kiser, who, according to Mickey Frank, has no business, paid $3,250 for whiskey (Rec. 209); Joy, an ex-bartender (Rec. 137), with no visible means of support (Rec. 127), but living on the bit of money he had saved (Rec. 131). Were these men in the liquor business? Moore said that he understood Joy and Miller would buy liquor (Rec. 271); Todd had bought liquor from Joy several times (Rec. 272); the Mid-City Express had hauled other liquor for him (Rec. 141). Where is the evidence to show that the defendants also were engaged in the liquor business?

If the above facts, proved by government witnesses, be not conclusive, the deficiency is supplied by the interest instead of the defendants displayed by Joy on the stand (Rec. 1354) and by his conduct with witnesses. He sought to subsidize Greenwald, to make him say that he had seen "Hattie and them" at the car, when in fact he had not (Rec. 142), and he exhorted him generally to "pass the Joys" (Rec. 140). He sought to influence the testimony of Mr. Grimaldi (Rec. 108). He corrected Miller in his statements (Rec. 136). The final touch approved is the colloquy. Joy knew that he was on trial and when his answers were hanging in the balance, he went out and procured Todd to be a witness (Rec. 276), even though it was at the expense of adding one more item of perjury to his already overburdened record (Rec. 156).

C. The case was, therefore, such that the approvers as well as the defendants were on trial.

No case, we submit, can be found in the books which presents a clearer or sharper conflict as to the perpetrators of the crime. The basic facts were admitted—there was a conspiracy to bring liquor to Chicago and to sell it here. The case falls within the second of the two classes of cases involving approvers as witnesses, that is, it is a case where fact "B" is admitted and the sole question is, who committed it. For the purpose of answering this question, the approvers were on trial to the same extent as the defendants. In *Harper v. State*, 165 Ind. 222, 114 N. E. 4, the defendant was accused of rape on a feeble-minded, unmarried female, one Eva Monier. She was delivered of a child before trial and fact "B," the fact of sexual intercourse, was thereby conclusively established. She testified that she had had intercourse with no one but the defendant. One Ella Fouts was a witness and gave very damaging testimony. The defendant denied that he had committed the act of intercourse and on motion for a new trial offered newly discovered evidence, to wit: The testimony of two witnesses who would swear that, about the time of the alleged intercourse between the defendant and Eva Monier, they looked through the window of a certain vacant house and saw Ella Fouts and Eva Monier in the act of sexual intercourse. The motion for a new trial was denied, but on appeal the judgment was reversed and the cause remanded with directions to grant a new trial. We take it to be uncontroverted that testimony that others had been guilty of the same crime would in no way exculpate the defendant, and if that had been the only point made in favor of the admission of the newly discovered evidence, we know of no theory upon which the evidence would have been admissible. In view of the fact, however, that Eva Monier had testified the

she had had intercourse with no one but the defendant, the newly discovered evidence tended to show that Elba Fouts was the guilty party and was attempting to shift the crime onto the shoulders of the defendant.

Kelley v. State (Tex. Cr. App.) 216 S. W. 198, presents a case very similar to the instant case. In that case, the defendant was convicted of arson, testimony incriminating him being given by one Le Blanc. The defendant testified that he had discovered the fire and had worked to put it out. The theory of the state was supported by certain witnesses who drew inferences and had their suspicions aroused, while the defendant's story was supported by witnesses who came upon him as he was working to put out the fire. The defendant, on motion for a new trial, offered newly discovered evidence, to wit: The testimony of two witnesses who saw the defendant in his home and immediately thereafter saw Le Blanc and two unknown persons near the place where the fire occurred. The motion was denied, but on appeal the judgment was reversed and the cause remanded with directions to grant a new trial, the Court, speaking through Mr. Justice Morrow, saying, at page 199:

> "Recalling that Le Blanc admittedly upon some motive was one of the incendiaries, the new evidence, putting him and companions whose identity was not disclosed upon the trial in proximity to the crime, both in time and locality, was such, we think, as might have been regarded by the jury as important in accounting for the fire in a manner consistent with the innocence of the appellant.
>
> Particularly is this true in view of the marked conflict in the evidence given by the witnesses for the state and the defendant, who, so far as the record shows, were not in any way interested in the result of the trial."

The instant case differs from the *Kelley* case only in this: in the instant case not one disinterested witness was brought forward by the government to prove even inferences and suspicions. The few disinterested witnesses who were brought forward all testified to facts which implicated Joy even more than his own testimony, and failed to identify the defendants, although offered ample opportunity. The offered evidence in the *Kelley* case would not be admissible if its purport were merely to show that Le Blanc and his two companions were also implicated in the crime. It only became admissible because the investigation was not as to the existence of fact "B" (the fire), but was as to the perpetrators of the crime.

In *Mendoza* v. *State* (Tex. Cr.) 225 S. W. 169, the defendant was accused of stealing twenty-one small turkeys. Refina Gonzales and his wife both testified that the defendant and one De Leon had borrowed a sack, caught the twenty-one small turkeys and made off with them. The defendant denied the theft and the turkeys were never found in his possession. The turkey hen, however, was found on the premises of Gonzales. After the evidence was closed, but before the argument was completed, the defendant offered evidence to prove that Gonzales had offered to pay for the turkeys if the owner would not take the matter to court. The trial court declined to receive the evidence, and on appeal the judgment was reversed and the cause remanded on the ground that the trial court should have exercised its discretion under the statute, reopened the case and admitted the testimony, which was

> "favorable to the appellant tending to exculpate him, tending to discredit Gonzales and to emphasize the suspicion cast by the circumstances upon him as the offender" (p. 170).

In *Ex parte Gilstrap*, 14 Tex. App. 240, the defendant was convicted of the murder of one Chiffet. One Criner was the most important witness and by him most of the criminative facts were established. The evidence offered was that Criner had said, immediately after the killing of Chiffet, that he, Criner, had shot Chiffet; that Criner, a day or so before the killing of Chiffet and Guilliot, had said that he would have his son Alfred whip Guilliot. The evidence was excluded on objection that no predicate had been laid for the impeachment of the witness and upon the further ground that the evidence was not material. In reversing and remanding, the Court, speaking through Mr. Justice Hurt, said, at page 265:

> "Was a predicate necessary? By no means. Criner being a witness, applicant had the right, without predicate, to introduce any fact or circumstance tending to connect him with the crime, which would be admissible if Criner himself had been on trial."

In Texas, a conviction cannot be had upon the uncorroborated testimony of an approver; in the federal courts, it can be. But the fact nevertheless remains that the approver is on trial as much as the defendant, and it ill becomes the government to seek to limit the evidence which tends to discredit the approvers and to make it more probable that they, instead of the defendants, committed the crime.

III.

The excluded evidence should have been admitted because it tended to prove that the approvers, and not the defendants, were the real culprits.

The evidence sought to be elicited by questions addressed on cross-examination to the approvers was also

admissible as laying the foundation for impeachment, Mickey Frank having testified that before that he had sold but ten cases (Rec. 103), Joy having testified that he had not been engaged in the illegal traffic in liquor (Rec. 131, 132), and Miller having testified that he had not brought a carload of whiskey to Chicago (Rec. 149).

We prefer, however, to discuss the excluded evidence in its more substantial and important bearing upon the case.

It is not necessary, in order that a fact be relevant and admissible, that it be of high probative value; it need be only of sufficient force to warrant its being considered by the jury (1 Wigmore on Evidence, §29; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 44). The general rule would seem to be that any relevant fact is admissible if, taken in connection with other admitted facts, or with an offer of proof of other facts, it tends to incriminate another and to exculpate the defendant (*People* v. *Myers*, 70 Cal. 582, 584, 12 Pac. 719, 720; *McDonald* v. *State*, 165 Ala. 85, 89, 51 So. 629, 631).

We admit that the defendants do not come within the rule if the facts to be elicited merely tend to show that a third person had a motive, or merely an opportunity to commit the crime (*Horn* v. *State*, 12 Wyo. 80, 129, 73 Pac. 705, 715; *Irvin* v. *State*, 11 Okl. Cr. 301, 331, 146 Pac. 453, 464; *Fields* v. *U. S.* (C. C. A.) 221 Fed. 242, 244; *Griffin* v. *U. S.* (C. C. A.) 248 Fed. 6, 9). So also of an attempt merely to show that others besides the defendant were implicated in the crime (*Patrick* v. *State*, 45 Tex. Cr. 567, 568, 78 S. W. 947). The ultimate fact sought to be established by the defense was that Joy and Miller, were the conspirators who brought the liquor to Chicago and sold it, and that the defendants were brought into the case as the result of a conspiracy among the guilty to foist upon them the commission of the crime.

Does the excluded evidence tend to show that the approvers were the guilty parties and that the defendants were not? We make no claim that the excluded evidence, in and of itself, without reference to other facts in the record, does make this showing. The point made is that the excluded evidence, taken in connection with other facts in the record, does tend to show that it was more probable that the car was brought to Chicago and the whiskey sold by the approvers, rather than by the defendants.

There is no evidence in this record, aside from the words of the approvers, which shows that the defendants ever sold or even possessed a drop of liquor illegally. There is evidence that Perlman's place was raided (Rec. 193), but there is no evidence that any intoxicating liquor was even found therein. There is evidence that a temporary injunction was issued, on *ex parte* hearing, against the partners of Quinn (Rec. 261), but there is no evidence that Quinn sold or even possessed liquor.

There is, however, evidence in this record to show that Joy and the other approvers were at least casually acquainted with the fact that it was still possible to sell intoxicating liquor if one tried very hard. How is it possible to say that evidence to show that they had engaged extensively in the illegal traffic in liquor; that Miller had brought other carloads of whiskey to Chicago, would not have influenced the jury to believe the defendants and their unimpeached witnesses, rather than the self-impeached approvers? As was said by the Court in *State* v. *Harris*, 153 Ia. 592, 596, 133 N. W. 1078, 1080, in speaking of evidence of a similar general character:

> "Neither the trial court nor this court can say that such evidence was of little consequence, and would not have been given consideration by the jury. It is the jury that is to determine the weight of such evidence, and, when the defendant is denied the right

to present his case to the jury, he has not received the fair and impartial trial guaranteed him by the law."

The defendants, by the rulings excluding evidence, were, we submit, deprived of an opportunity to present fully a vital part of the theory of their defense, namely, that Joy and Miller, in the course of their wholesale illegal traffic in liquors, brought this carload of whiskey to Chicago and then peddled it to Todd, Mickey Frank and others.

IV.

The defendants were entitled to a charge presenting to the jury their theory of the case and the trial court erred in refusing such requested charge.

The learned trial court charged the jury upon the theory of the government and further charged the jury that they should not concern themselves with any individual not named in the indictment, as they were of interest so far as the case was concerned only as their connection or story tended to establish the guilt or innocence of the defendants (Rec. 295). The learned trial court then refused the request of counsel to place before the jury the theory of the defense and to instruct the jury to consider the approvers to the extent of determining whether they or the defendants were the conspirators. In other words, the learned trial court not only declined to admit evidence tending to prove that the approvers were the conspirators, but it also refused to permit the jury to consider whether or not the evidence already in the case showed that the approvers were the conspirators and that the defendants were not.

The defendants were entitled to have their theory of the case presented to the jury (*Stevenson* v. *U. S.*, 162

U. S. 313, 323; *Bird* v. *U. S.*, 180 U. S. 356, 361; *Hendrey* v. *U. S.* (C. C. A.) 233 Fed. 5, 18; *State* v. *Gallivan*, 75 Conn. 326, 338, 53 Atl. 731, 733; *Payton* v. *State*, 4 Okl. Cr. 316, 111 Pac. 666).

In *Hall* v. *State*, 69 Tex. Cr. R. 332, 153 S. W. 902, the State offered evidence to show that the defendant was guilty of the crime of theft. The defendant offered testimony to show that the guilty person was not the defendant, but was one Troy Lane. The trial court refused to charge on the defendant's theory of the case. In reversing the judgment of conviction, the Court, speaking through Mr. Justice Harper, said, at page 333 of the official report:

> "Under an unbroken line of decisions this court has held that where the testimony raises the issue that another person may have committed the offense, this issue must be submitted to the jury in the charge of the court, and where a special charge is requested and refused, this will present reversible error."

Under the special circumstances of this case, the error was made more serious than in any of the cases cited by the fact that the court, in its charge, had grouped together facts which tended to support the government's theory and had not only failed to charge on the theory of the defense but had even restricted the jury as to the extent to which the jury could give consideration to the approvers and their testimony (*Francis* v. *State* (Tex. Cr. App.) 55 S. W. 488).

> "Justice and the law demanded that so far as reference was made to the evidence, that which was favorable to the accused should not be excluded." (Mr. Chief Justice Fuller in *Allison* v. *U. S.*, 160 U. S. 203, 212.)

V.

The court erred in giving the instruction on accomplice testimony and in declining to give defendants' requested instruction "C," such instructions having an important bearing on the defendants' theory of the case.

A. The instruction given was erroneous in that it failed to advise the jury against convicting unless corroboration was found in untainted testimony; the instruction refused, on the other hand, contained a correct statement of the law.

Before proceeding further we wish to emphasize the point now being urged. It is not our contention that a conviction cannot under any circumstances be had upon the testimony of an uncorroborated approver, but, on the contrary, the requested instruction informed the jury that

> "an accomplice is an admissible witness and a conviction may be had on the uncorroborated testimony of such a witness * * *."

The state of the law relative to accomplice testimony is, we believe, as follows:

> The jury must, on request, be instructed on the dangers of accomplice testimony and must be advised against convicting on such testimony if uncorroborated. If, however, the jury, having been so advised, chooses to convict, the judgment of conviction will not be reversed because of that fact.

The point which we here make, is not that the jury convicted upon the uncorroborated testimony of approvers, but that they were not advised against so convicting.

The dangers surrounding accomplice testimony are too well known to warrant discussion, especially in view of the fact that they are well illustrated in the present case.

In *Reagen* v. *U. S.*, 157 U. S. 301, the Court, speaking through Mr. Justice Brewer, said, at page 310:

> "The court should be impartial between the government and the defendant. On behalf of the defendant it is its duty to caution the jury not to convict upon the uncorroborated testimony of an accomplice."

In *Freed* v. *U. S.* (App. D. C.) 266 Fed. 1012; *McGinniss* v. *U. S.* (C. C. A.) 256 Fed. 621, and *People* v. *Aiello*, 302 Ill. 518, judgments of conviction were reversed where the testimony was that of uncorroborated accomplices.

Recurring to the instruction given, we find, as the Court of Appeals found in the *McGinniss* case, that no word of caution is contained therein except general language applicable to any witness (Rec. 291), plus the further statement that accomplice testimony was not entitled to the same weight as the testimony of an innocent party, that the jury would be required to approach the testimony of an accomplice with some caution and

> "would be required to scrutinize it closely, not reject it, but scrutinize it carefully and only cautiously accept it."

On the other hand, the requested instruction, while reducing to a minimum the rights of a defendant, correctly stated the law. This instruction first informed the jury that certain witnesses, naming them, might be accomplices. A definition of accomplices was then given to the jury. The instruction continued, not by instructing the jury that the named witnesses were accomplices, but by telling the jury that if the jury found such witnesses to be accomplices, nevertheless, an accomplice was an admissible witness and a conviction might be had upon his

uncorroborated testimony. The instruction then contained a caution to the jury, and, finally advised them not to convict unless the testimony of the accomplice was corroborated. The instruction ended with a statement as to the rule of corroboration.

The instruction given by the court, on the other hand, was insufficient, it is submitted, in that the attention of the jury was not sharply directed to the dangers of accepting accomplice testimony at its face value.

The learned trial court, in its opinion (Rec. 39), cites the *Caminetti* case, 242 U. S. 470, as supporting its ruling. In this case the opinion of the Court disposes of three cases. The instructions requested in the *Stapp* and *Caminetti* cases appear in 220 Fed. at p. 352, and, as stated in the opinion of the Circuit Court of Appeals, were as follows:

> "That the jury should determine from the evidence and circumstances whether Maudie Warrington and Lola Norris, or either of them, were accomplices of the defendants, and that, if it was found that they were, the testimony of an accomplice should be received with caution and weighed and scrutinized with great care by the jury, and that the jury should not regard the testimony of an accomplice, unless she is confirmed and corroborated in some material parts of her evidence."

The Circuit Court of Appeals disposed of this point on the following grounds:

> "First. A refusal to instruct as to the value of the testimony of an accomplice is not error for which a judgment should be reversed (Citing *Holmgren* v. *U. S.*).
>
> Second. We are of the opinion that as to the counts of the indictment on which the defendants were found guilty neither Maudie Warrington nor Lola Norris was an accomplice * * *."

The instruction requested in the Hays case appears in [21 Fed. at p. 109], and was as follows:

> "The defendant requests the court to instruct the jury that the girl, under the facts and circumstances, is an accomplice, and that it is a rule of law that before the jury can take the testimony of an accomplice, it must be corroborated by other testimony of other witnesses, or by facts and circumstances which will convince the jury beyond a reasonable doubt."

The Circuit Court of Appeals disposed of this point on the following grounds:

> "First, the girl was not an accomplice (citing authorities); second, even if she were an accomplice, the request as framed states the requirements of corroboration much too strongly."

[The case of *Holmgren v. U. S.*, 217 U. S. 509] is much relied upon to sustain the contention that it is not reversible error to refuse to give an instruction on accomplice testimony. The instruction asked in this case was as follows:

> "I charge you that if you believe the testimony of the witness, Frank Watts, that that said witness was an accomplice in crime with the defendant, and I instruct you that before you can convict said defendant, the testimony of the witness, Frank Watts should be corroborated by the testimony of at least one witness or strong corroborating circumstances."

This Court decided the point on the last that the instruction invaded the province of the jury, saying [page 510]:

> "It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them. But no such charge was asked to be presented to the jury by any proper request to the court, and the refusal to grant the one asked for was not error."

A consideration of the instructions requested in these cases discloses the following faults:

(1) In the *Diggs* and *Caminetti* cases, the witnesses were not accomplices. The requested instruction was also erroneous because demanding that the jury disregard accomplice testimony unless corroborated.

(2) In the *Hays* case, the instruction assumed as a fact that which was not a fact, to wit: that the woman transported was an accomplice. The instruction was further erroneous as stating that before the jury can believe an accomplice, the jury must find corroboration.

(3) In the *Holmgren* case, the instruction was erroneous because it assumed as a fact that which was controverted.

In deciding the *Caminetti* case, this Court, speaking through Mr. Justice Day, said, at page 495:

> "We agree with the Circuit Court of Appeals that the requests in the form made should not have been given. In *Holmgren* v. *United States,* 217 U. S. 509, this court refused to reverse a judgment for failure to give an instruction of this general character, while saying that it was the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to such evidence. While this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them."

From the citation of the *Holmgren* case and from a knowledge of the instructions requested in the other cases, we submit that this Court, in the *Caminetti* case, merely decided that a defendant cannot complain of the failure of the court to give a proper instruction on accomplice testimony where none was requested.

We submit for consideration the belief that the uncertainty which has followed the ruling in the *Caminetti*

case has resulted from the juxtaposition, in the opinion, of two sentences which treat of two distinct phases of the question now under consideration.

The opinion first states that the better practice is for courts to advise the jury to require corroboration before giving credence to accomplice testimony. The situation here treated arises, in point of time, before the jury retires to consider its verdict, and the question is, whether or not the defendant is entitled to an instruction on accomplice testimony.

The opinion then continues to the effect that, notwithstanding the advice of the court, the jury may, nevertheless, convict on accomplice testimony, if it be believed by the jury. The situation treated in this sentence does not arise, in point of time, until after the verdict has been returned and the question then is, whether or not the verdict can stand, based as it is on the uncorroborated testimony of an accomplice. This question is not one with which we are now concerned, for the reason that the requested instruction assumes that the answer thereto is an affirmative one.

In discussing this point on motion for a new trial, the learned trial court stated (Rec. 38):

> "Counsel for defendants contend, however, that the proposed instruction only goes to the extent of advice from the court. In other words, the proposed instruction did not require the jury to acquit unless the testimony of accomplices was corroborated, but did express the court's views on such testimony. If such proposed instruction was merely intended as an expression of the court's opinion as to the weight to be given to testimony of accomplices, it was clearly a matter of judgment on the part of the trial judge whether such expression of opinion should be given or not."

We respectfully submit that the question is not what the individual judge may think of accomplice testimony

or of the testimony of certain accomplices. Witnesses who are interested in the result of a trial may be prejudiced by reason of their interest, and a party, whether in a civil or criminal case, is entitled to an instruction informing the jury that they may take into consideration the interest of the witness; and the party is entitled to this instruction whether or not the presiding judge believes that the interest of the witness has affected his testimony. So also a defendant is presumed to be innocent until his guilt is established, and we take it that a requested instruction so stating to the jury must be given even though the judge may believe that particular defendant is guilty.

The law considers that the testimony of approvers is most unsatisfactory and is fraught with danger. We respectfully submit that it is for the jury, and not for the judge, to say whether or not in any particular case the approvers may or may not be credited, since the credibility of witnesses is for the jury under proper instructions. Where there is a conflict in the evidence, we need no citation of authority for the assertion that no court, in any kind of a case, may direct a verdict in favor of one side or the other. The court, in any event, cannot direct the verdict against a defendant in a criminal case. If, however, the judge be permitted to choose the rules of law, which are to be applied in the trial before him, as he determines in his own mind the guilt or innocence of the defendant, and thereby inevitably influences the jury to that belief, because a jury having been instructed not to reject accomplice testimony will follow the instruction, does he not thereby, in effect, gain the power of directing a verdict against the defendant? If he may decide that the jury is not to be advised to seek corroboration before conviction, may he not decide that the particular approvers in question, being worthy of belief, are to be

considered as other witnesses and their testimony given the same weight? And having so decided, on the theory entertained by the learned trial court, could he be required to even direct the jury's attention to the difference between accomplice and other testimony?

The instruction requested on accomplice testimony is not one which presents to the jury the judge's opinion on the credibility of the witness any more than the instruction on the presumption of innocence presents to the jury the judge's opinion as to the innocence of the defendant. There have been established certain general rules of law which are applicable to all cases. An orderly administration of justice demands that trials be conducted in accordance with these general rules and the Constitution demands that the final result be left in the hands of the jury, not in the hands of the judge.

B. The instruction given was also erroneous in that it not only failed to state correctly the rule of corroboration, but stated it incorrectly; the instruction refused, on the other hand, contained a correct statement of the rule of law.

The learned trial court did not define corroboration for the benefit of the jury. Instead, an illustration was used. This illustration was, in part, as follows (Rec. 298):

> "Assume, if you will that A and B are indicted and on trial for entering the house of X in the night time and with the intent to burglarize it. C appears as a witness and states that he was with A and B on the night in question and all three of them broke into the house of X and took therefrom moneys, jewelry and bonds. Now, C's testimony shows him to be a confessed accomplice. * * *
>
> Now, assume that there is other testimony,—that X testified that he and his family left home early that evening, and returned home early the next morning, and found that their house had been burg-

larized and that moneys, jewelry and bonds had been taken and the description of the goods taken corresponded with C's testimony. There would be corroboration of C's testimony."

In other words, the fact that the carload of whiskey arrived in Chicago is corroboration of the fact that the three principal defendants brought it there. It is respectfully submitted that such is not the case. The arrival of the car, fact "B," was not the fact in issue. If A says that C committed fact "B," and C says that A committed fact "B," how can fact "B," the existence of which is admitted, be evidence of who committed it?

In *Sykes* v. *U. S.* (C. C. A.) 204 Fed. 909, the approver, in telling her story, said that Sykes had hidden the stolen mail bag in the weeds by the side of the railroad. The learned Court of Appeals held that the fact that the bag was actually found there did not corroborate her testimony that Sykes was the one who put it there. In *McNealley* v. *State,* 5 Wyo. 59, 36 Pac. 824, the approver testified that the defendant had killed the cow and hidden the hide. The hide had been found where the approver had said it had been hidden. The trial court charged the jury that this fact would be strong corroboration of the approver's testimony. The Supreme Court reversed the judgment, holding that such fact was no corroboration.

The learned trial court continued in the illustration:

> "Now, assume further that another witness testified that he saw the three, A, B, and C together at a place and at an hour quite unusual and yet consistent with C's entire story. In such a case, the corroboration of details in C's story might make C's testimony most persuasive of the truth."

In other words, the fact that Joy met Heitler in Perlman's saloon at midnight on Friday, October 1st, was corroboration of Joy's story. That might possibly have

been so if the defendants had denied that fact "B" had occurred. But where the defendants admit fact "B" and admit their presence at the unusual place and hour, but say that they were there subjected to blackmail, how does their presence show that they, and not the mythical C (Joy) committed fact "B"? The court might have meant that if Miller testified to about the same ultimate facts as Joy, Miller would thereby substantiate Joy and Joy, Miller. As to this, we also respectfully beg to differ. We fail to see how, or upon what theory of law, it can be said that a story becomes more convincing because told by two or five prospective perjurers instead of by one. The corroborating testimony must, in itself, be worthy of belief and one approver cannot corroborate another approver (*Jones* v. *Commonwealth*, 111 Va. 862, 868, 69 S. E. 953, 955; *U. S.* v. *Hinz*, 35 Fed. 272, 281; *Ratcliff* v. *State* (Tex. Cr. App.) 229 S. W. 857; 16 C. J. 710, § 1453).

Corroboration, also, must be as to guilt (*Sykes* v. *U. S.* (C. C. A.) 204 Fed. 909, 913; *Jones* v. *Commonwealth*, 111 Va. 862, 869, 69 S. E. 953, 955; *Smith* v. *State*, 10 Wyo. 157, 166, 67 Pac. 977, 979; *Howard* v. *Commonwealth*, 110 Ky. 356, 361, 61 S. W. 756, 758; *Clapp* v. *State*, 94 Tenn. 186, 195, 30 S. W. 214, 216; *Courson* v. *State* (Ga. App.) 94 S. E. 53, 54; 3 Russell on Crimes (7th Ed.) 2288; 16 C. J. 701, §1434). The way in which corroboration or no is determined is by eliminating from the case all testimony of the approvers. If inculpatory evidence remain, the approvers have been corroborated (*Welden* v. *State*, 10 Tex. App. at 401). Do that in this case, and what remains to connect the defendants, or any of them, with the crime? Nothing.

VI.

The court erred in declining to admit testimony as to what Joy said to George Ortseifen in the office of the assistant district attorney.

The defense tried to prove that Joy made certain statements to George Ortseifen (Rec. 167-8). What those statements were, does not appear in the record, except that they were to show Joy's interest in the litigation, his attempt to influence the witness, and were not contradictory of anything he had said on the stand. Here is the erroneous theory in full force. Joy, the mere witness, could not be impeached by showing that he was interested, which by that time was self-evident, for this testimony was merely cumulative. But the evidence should have been admitted against Joy, the party.

Here was a man who had so little faith in his own story and his own witnesses that he was attempting to corrupt the witness of the other party. Surely, it needs no citation of authority to show that such testimony would have been admissible in a civil action between Joy and the defendants, and it should have been admitted herein as part of the defendants case, tending to show more than a mere academic interest, going so far as to show what amounted to a proprietorship over the litigation.

Beyond all question, this case was wrongly entitled. It should have been entitled

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VII.

The court erred in sustaining the objection of the government to, and in declining to admit, evidence offered by the defendants to show a variance, to wit: evidence to prove that the approvers were known to the grand jury to have been conspirators and were not unknown.

Retracing our steps for the moment, we have seen how the erroneous theory operated in the case to the great prejudice of the defendants. We now see how it originated. The government and the grand jury swallowed whole the entire story of the approvers. To them, this was a case wherein fact "B," the crime, was in issue. Little did they dream that the case was one of that extremely rare class in which the identity of the culprits was the only point in issue. Hence, the indictment omitted all reference to Joy and his friends. If the approvers had been brought to trial, all the excluded evidence would have been admissible against the approvers as defendants. Here, then, is a substantial and important harm suffered by the defendants as a result of the gullibility of the government and of the grand jury, and the failure of the latter to state truthfully in the indictment what they had discovered as a result of their investigation.

The indictment charged that the other conspirators were unknown to the grand jurors (Rec. 2), but the fact was that the approvers were known and not unknown. The defendants offered twice to prove the variance, once on cross-examination of Joy (Rec. 129-131), and once as an affirmative defense, as part of the defendants' case (Rec. 233-4). Both times, Joy and a grand juror were offered as witnesses.

The learned trial court sustained the objections of the government to the several offers of proof and refused

to admit the evidence (Rec. 131, 234). The point was also specifically called to the attention of the learned trial court by the several motions for a new trial, being point 17 of the written motions of the defendants Heitler, Perlman, Greenberg and McCann (Rec. 20, 23, 26, 30), the defendant Quinn having made an oral motion (Rec. 309), which motions were overruled and denied by the court (Rec. 321).

The learned trial court, in its opinion, commented upon the fact that counsel, on motions for a new trial, directed the argument to the failure of the grand jury to name Joy, neglecting the other approvers (Rec. 35). In our brief, filed in support of said motions, we had made the following statement, which we here reiterate:

> "The offer made on behalf of the defendants comprehended within its terms the witnesses John Miller, Morris Frank, Harry Frank, Louis Greengaard and John Fitzpatrick, in addition to Maurice Joy. The discussion in the brief will be confined to a consideration of the offer as regards the witness Joy, the other witnesses adding nothing except in quantity."

A. In the courts of the United States, a variance arising from the fact that the evidence does not support an allegation that a thing is unknown to the grand jury, is a matter of affirmative defense which can be proved by the defendant.

1. In general, a variance results from the failure of the proof to correspond with the allegations of the indictment.

Before proceeding further, we wish to emphasize the point we now raise. The point is not that the indictment is defective because of failure to name all other co-conspirators, because we admit that the omission to state names "is satisfied by the allegation, *if true,** that such

*Italics ours.

names * * * are to the grand jury unknown" (*Durland* v. *U. S.*, 161 U. S. 306, 314). Nor do we contend that the grand jury should have investigated and ascertained who the other "unknown" conspirators were. Our point is simply this: that having actually made such an investigation, the grand jury must state truthfully the result thereof. Having in fact ascertained the names of some, at least, of the co-conspirators, the grand jury must state those names in the indictment and should not be permitted to aver falsely that those names were unknown.

> "A false averment in an indictment that names were unknown savors of trickery, and is most reprehensible. A bill presented by a grand jury as a true bill should not contain averments that are known to be false" (*State* v. *Smith*, 89 N. J. L. 52, 54, 97 Atl. 780).

The point which we make has nothing to do with the allegations of the indictment as such, and we beg to disagree with the learned trial court as to the applicability of reasoning drawn from Amendment VI. Whether or not an indictment fully states an offense is determined upon demurrer before trial. The point of variance can only arise during trial and the question then is, not whether the indictment fully states an offense, but whether the proof supports the allegations of the indictment.

Whenever a variance appears upon the trial, the defendant is entitled to a directed verdict in his favor (*U. S.* v. *Riley*, 74 Fed. 210; *Naftzger* v. *U. S.* (C. C. A.) 200 Fed. 494, 501; *State* v. *Smith*, 89 N. J. L. 52, 97 Atl. 780; *People* v. *Hunt*, 251 Ill. 446, 96 N. E. 220). Thus, in the *Riley* case, the opinion in which was written by the present Chief Justice (then Circuit Judge), a verdict was directed where the evidence showed that the grand jury knew certain names which the indictment averred were unknown.

A variance is to be distinguished, also, from a mere conflict of evidence in that, as a general rule, a variance is something which appears from the testimony adduced by the prosecution, it is not something which must be proved by the defense. Thus, the charge being assault with a weapon unknown to the grand jury, if the proof for the prosecution discloses that the weapon was known to have been a hammer, a variance results (*Johnson* v. *State*, 4 Ala. App. 62, 58 So. 754). In cases involving the allegation that a certain fact is unknown to the grand jury, the rule in Texas is that the prosecution must adduce proof to support this allegation as well as other allegations (*Martin* v. *State*, 80 Tex. Cr. R. 275, 189 S. W. 262).

2. In the courts of the United States, however, the averment that a thing was unknown to the grand jury is presumed to be true until the contrary appears (*Coffin* v. *U. S.*, 156 U. S. 432, 451). The prosecution therefore starts with the presumption in its favor.

3. The result of this presumption is to shift the burden of proof onto the defendant.

The statement that a thing is presumed is merely another way of saying that the burden of coming forward with the proof has been shifted to the opposite party (4 Wigmore on Evidence, §2490; *Holt* v. *U. S.*, 218 U. S. 245, 253).

B. The offer of proof was complete and satisfied all legal requirements.

1. The inquiry is as to the actual knowledge of the grand jury of a specific fact.

We are frank to admit that the inquiry is as to the actual knowledge of the grand jury, and what the grand jury ought to have known, or what it could by investiga-

tion have found out, is absolutely immaterial (*Com.* v. *Glover*, 111 Mass. 394, 401; *Enson* v. *State*, 58 Fla. 37, 40, 50 So. 948, 949).

2. The defendants offered to prove the actual knowledge of the grand jury by the witness who testified, and by a member of the grand jury who heard.

We take it that there can be no question but what a grand juror was a competent witness (12 R. C. L. 1039; *Atwell* v. *U. S.* (C. C. A.) 162 Fed. 97; *State* v. *Benner*, 64 Me. 267; *Com.* v. *Hill*, 11 Cush. 137; *Com.* v. *Mead*, 12 Gray 167; *Com.* v. *Green*, 126 Pa. St. 531, 17 Atl. 878).

In its opinion, the learned trial court said (Rec. 35), speaking of Joy:

> "That his testimony before the grand jury was the same as upon this trial may also be admitted; but it by no means follows that the grand jury believed he was in the conspiracy charged in the indictment."

Also, during the argument, it was suggested by the learned trial court that a distinction might be made between the *Riley* case and the instant case, in that whether or not certain men had paid certain money or made contributions was, in the *Riley* case, a fact, while in the instant case, whether or not a man was a conspirator was a conclusion from other facts, and while the grand jury might know that Joy had bought whiskey from Heitler, Perlman and Greenberg before October 1st, had gone out and procured a purchaser in order to obtain the remaining thirty-two cases, had gone to Gresham Station and received his whiskey, nevertheless, notwithstanding such knowledge, the grand jury might not know that Joy was a conspirator. Of course, the mere fact that an individual is mentioned in testimony before the grand jury is not evidence that, from such testimony, any particular conclusion was drawn (*Cooke* v. *People*, 231 Ill. 9), and if the offer of proof had merely been to the effect that

Joy had recited certain facts to the grand jury, the offer would have been defective. This is the very reason why a grand juror was included, as a witness, within the terms of the offer.

We first call attention to the fact that, in the *Riley* case, whether or not men had made contributions was not the fact in issue. The fact in issue was whether or not the grand jury *knew* that such contributions had been made. In order to establish as a matter of absolute proof the deductions and conclusions drawn by the human mind from oral testimony, it is necessary to produce not only the witness who gave the testimony but also the possessor of the said mind, that the latter may be asked what he concludes from such testimony, which is exactly what the defendants offered to do. The distinction between the *Riley* case and the instant case, is, it is submitted, merely one of degree and not of kind. In the *Riley* case, the question was merely whether or not the grand jury knew a certain fact from the evidence before it. In the instant case, the first question is, did the grand jury, from the evidence before it, know the connection of Joy with the conspiracy? So far there is an exact parallel with the *Riley* case. The next question is, did the grand jury know that the said connection was that of a conspirator? We do not believe that it can be successfully maintained that the grand jury did not know that Joy was a co-conspirator from the facts before it, which must be taken to be the evidence elicited from Joy on direct examination, since this is the only conclusion which can be drawn from such facts. We are strengthened in this belief by the fact that another individual, the co-defendant Ambrosi, was indicted as a co-conspirator and his connection with the conspiracy, if the government's testimony is to be believed, was that of a purchaser, the distinction between Ambrosi and Joy being that Ambrosi did not go out and resell any of the liquor while Joy did.

The defense, therefore, made a complete offer when it tendered not only the witness who spoke but also the grand juror who heard and understood.

C. The variance was, therefore, fatal since the crime of conspiracy is not, nor should it be, an exception to the general rule.

Since the existence of the general rule, that a variance is fatal, must be admitted, there seems to be no good reason why this defense should be done away with in this particular crime, which has been termed "a drag-net of vague charges" (*State* v. *Van Pelt*, 136 N. C. 633, 641), a description particularly apt, as an analysis of the elements of this crime will disclose.

Since the time proved may be any within the statute of limitations, the place, Chicago, is rather large, and the word "conspired" is devoid of all facts to distinguish one mental act from another, a defendant would not learn much from these allegations. The allegations setting forth the overt acts may or may not inform a defendant of his own supposed acts, depending upon whether or not he is named therein. Only in the allegations setting forth the objects of the conspiracy and the names of the co-conspirators can a defendant find information essential to his defense.

In the case of *Commonwealth* v. *Hunt*, 4 Metc. 111, Mr. Chief Justice Shaw, in discussing a relaxation of the rules of law as applied to conspiracy, used the following language (page 125):

> "From this view of the law respecting conspiracy, we think it an offense which especially demands the application of that wise and humane rule of the common law, that an indictment shall state, with as much certainty as the nature of the case will admit, the facts which constitute the crime intended to be charged."

A defendant charged with the crime cannot, of course, no matter how innocent he may be, merely come into court and deny that he had anything to do with the conspiracy, relying upon his innocence to protect him from the perjury or honest mistakes of the government witnesses. The defendant must prepare his case in order that he may show the court and jury, if such be the fact, that he was engaged in business in some other place at the time he was supposed to have met with his co-conspirators, or he may show the records, if any, of the government witnesses, or, as in the instant case, the evidence may show that the government witnesses, and not the defendants, were guilty of the crime. To deny a defendant the privilege of ascertaining the approvers who will appear against him is to make a mockery of the right to be confronted with witnesses and to whittle away confrontation until it becomes a mere facial encounter. How is a defendant to investigate the character of an opposing witness, to investigate the facts to which he may testify—how is he, in short, to fully prepare his case for trial, if he is not even informed of the name of the witness, let alone his connection with the charge in question? It appears (Rec. 35) that the learned trial court was of the opinion that the defendants had been fully apprised before trial of the story to be told by Joy. It is respectfully submitted that this fact is immaterial. The intent of Amendment VI is that the defendants shall be informed of the charge by the allegations of the indictment—nothing is said about their having to hire private investigators. We frankly admit that these defendants knew the ultimate facts in Joy's story, but the rules of law whereby guilt or innocence is ascertained operate alike upon all. We cannot have one rule of law for those who have been enabled by their own investigations to ascertain the charges against them and another

and entirely different rule of law for other defendants who have been less fortunate in investigating. The argument as to the knowledge of the defendants comes, we further submit, merely to this: that if the defendants had not prepared for trial, they could have claimed a variance, but having prepared for trial and having ascertained the true state of the alleged facts to be urged against them, they have thereby waived the point of variance. If such be the fact with respect to one of the six essential allegations of a conspiracy count, would it also be the fact, may we inquire, of two, three, four, five or all?

D. The cases cited in the opinion of the learned trial court, and the reasoning appearing therein, do not support its ruling.

1. The indictment in this case does not inform the defendants of the charges against them in such a way as to satisfy the constitutional requirement.

The learned trial court in its opinion (Rec. 32 ff.) has recourse to Amendment VI to determine whether or not the defendants have been informed of the charge, the thought being that if they have been informed of the charge against them, no point of variance can be made. Before proceeding further, we wish to make a distinction between an indictment which fails to set forth all the elements of a charge and an indictment which does set forth all such elements. The first will be insufficient because it fails to comply with the requirements of the amendment. Because the second does so comply, does not mean that a judgment of conviction thereunder will not be erroneous if a variance exists. The two points are entirely separate and distinct.

The learned trial court closed that part of its opinion

dealing with the point on variance with this statement (Rec. 36):

> "If the purpose of an indictment be to apprise the defendants of the nature and character of the charge so that each defendant, be he innocent or guilty, may prepare adequately for trial, then the failure of the grand jury to name Joy or any other person was not fatal in this case."

We respectfully submit that the learned trial court has confused knowledge gained from the indictment and knowledge gained by private investigation aside from the indictment. The constitutional requirement is that the *indictment* should inform the defendants. A most casual reading of this indictment will disclose the fact that nowhere therein is mention made of any of the government witnesses. The indictment therefore does not disclose to the defendants this particular element of the charge.

The learned trial court further notes that this indictment sets forth with great particularity the transaction in whiskey. This may be true of the defendants Heitler, Perlman and Greenberg. Examining the indictment (Rec. 2-4), we find, however, that the defendants McCann and Quinn are mentioned therein but twice, *i. e.*, that they conspired with certain individuals and that they, with all the rest of the defendants, unloaded the car at Gresham Station (Overt Act No. 5). As we have before noted, the assertion that they conspired conveys no information; and the statement that they unloaded the car was entirely unsupported by proof, there being not one word in this record to show that either of these two defendants was at that or any other time within one hundred miles of that car. If the learned trial court's reasoning is to be followed, we must, we submit, have one rule which is to be applied to Heitler, Perlman and Greenberg and another rule which is to be applied to Quinn and McCann.

2. *People* v. *Mather*, 4 Wend. 229, was wrongly decided in principle.

This case was much relied upon by the government in argument on the motions for a new trial, and as a consideration thereof is inevitable, we have taken this opportunity of discussing it.

This was the famous Masonic conspiracy case arising out of the disappearance of one Morgan. The indictment charged that "the defendant, with divers persons unknown to the jury, did conspire, * * *." The defendant was acquitted by the trial jury and the state moved for a new trial. The defendant submitted certain propositions to the court to show that a new trial should not be granted, because, in any event the defendant could not be convicted under the indictment. Among the points so submitted was the point that the indictment charged a conspiracy with persons unknown, whereas the persons so charged to have been unknown were in fact known. The trial court denied the motion for a new trial and this ruling was sustained on appeal. The real point in the case was that the state was not entitled to a new trial after a verdict of acquittal. The Court, in discussing the point now in question, said at page 266:

> "* * * if a person is charged with a larceny, the indictment ought to show who was the owner of the goods stolen, that the accused may know for what act he has to answer. But in a charge of conspiracy it seems no more necessary to specify the names of the defendant's coadjutors than in an indictment for an assault and battery to name others besides the accused who were concerned in the trespass, if the fact were really so. In Kinnersley and Moore a case is mentioned where this point was directly passed on. The bill presented to the grand jury charged that Herne with A and *cum multis aliis* conspired to accuse B of a felony. The grand jury returned the bill with an ignoramus as to A. Then the charge against Herne as presented by the indictors was, that he

with many others conspired, etc. The indictment was objected to as insufficient on motion to arrest the judgment; but the court denied the motion, and said that the indictment was sufficient, it being found that Herne with many others did conspire, etc., and it might have been so laid at first."

We respectfully submit that the learned Court was very much confused in theory, as is disclosed by its citation of the *Kinnersley* case (1 Str. 193), which is sufficiently set forth in the above excerpt to show that it is not in point. If A has committed the crime of larceny that crime is complete in itself and is neither increased nor decreased, nor affected in any way, by the fact that B was present and took part therein. The fact that B hit X with a hammer is in no way descriptive of the fact that A hit X with a club. It is far different with conspiracy, for the second individual is an essential element; without him there can be no such crime. The learned trial court in its opinion said (Rec. 32):

"The two decisions *Jones* v. *United States*, 179 Fed. 584, and *People* v. *Smith*, 239 Ill. 91, respectively, admittedly support the Court's ruling * * *."

We beg leave to state with great respect that the learned trial court is in error. In the *Jones* case, the defendants were accused of conspiring among themselves, and with divers other persons to the grand jury unknown, to defraud the United States. It was contended that one Ormsby, not a defendant, was a co-conspirator, and was known to the grand jury to have been such, the said Ormsby having appeared as a witness before the grand jury. The Court of Appeals calls attention to the fact that the indictment, in the allegations with reference to two of the overt acts, fully set forth the connection of Ormsby with the conspiracy, saying, at page 596:

"The name of Ormsby and his connection with the case was known to the grand jury and he and his acts were properly described in the indictment."

It is true that the learned Court of Appeals states its belief that the correct rule was that declared in the *Mather* case, but nevertheless, it preferred to place its decision on the ground that there was no variance between the proof and the allegations of the indictment.

In the *Smith* case, the record does not disclose that the grand jury in fact knew that one Howe was a co-conspirator nor does it disclose anything more than that the grand jury might have had such knowledge. With the exception of the *Mather* case, the cases cited in the *Smith* case as authority for the Court's ruling have but little, and some of them have nothing, to do with the point under consideration. The *Graff* and *Cohen* cases in particular are valuable merely for their citation of the *Mather* case, but on an entirely different point.

It is submitted that the weight of authority on the question now under consideration consists solely and entirely of *People* v. *Mather*. It would not seem that the point was discussed in that case with sufficient discrimination to warrant the assumption that, notwithstanding the point was not involved in the decision, the case may nevertheless be considered as a leading one.

It is respectfully submitted, therefore, that the allegations with respect to unknown conspirators must be treated, as to variance, in exactly the same manner as an allegation with respect to unknown articles which have been the subject of larceny, unless there is some proper foundation in theory upon which it may be distinguished, and the burden in this respect should be upon those who seek to distinguish, not upon the defendants who seek to apply a general rule which has been and is universally acknowledged, to wit: A variance results where that which is charged to have been unknown to the grand jury was in fact known.

VIII.

The court erred in giving the instruction which purported to describe to the jury the charge in the indictment, in that the offense so described was not the offense with which the defendants were charged.

The learned trial court charged the jury informally (Rec. 292, 294) and practically told them that the conspiracy was one to bring the liquor to Chicago unlawfully and to distribute it to persons not entitled to receive it.

We fully appreciate the fact that the learned trial court so charged the jury because, as stated in its opinion (Rec. 39),

> "* * * each and every one of the attorneys, both in argument to the court, and in argument before the jury, stated that there was no question of the existence of the conspiracy * * *."

If the case had been tried on the proper theory, and if the defendants had been permitted to place the only fact in issue squarely before the jury, this point would not have been raised. We have seen, however, that they were not permitted so to do and the court was informed by the motions for a directed verdict, points 8 and 10 thereof (Rec. 11, 13, 14, 16), that the defendants would insist upon taking advantage of this specific defense, since none other had been left them.

A. The charge was, from the standpoint of this defense, erroneous in the following particulars:

(1) The instruction first charged the jury that the possession, transportation and sale were illegal unless for medicinal or sacramental uses. The learned trial court had evidently come to the conclusion that the National

Prohibition Act prohibits such transactions in intoxicating liquor except for medicinal and sacramental uses. We are in entire accord with the learned trial court in its interpretation of this Act. In the event, however, that this Court should hold that the Act is constitutional on the ground that it does not prohibit the purchase, sale, transportation and possession of intoxicating liquor for other non-beverage purposes, to wit: for culinary, manufacturing and mechanical purposes, the point would be made that the charge, as given, authorized the conviction of the defendants even though the jury might find that the purpose was permitted by the statute. In any event, if the jury found that the purpose was culinary or mechanical, they were authorized to convict under this charge.

(2) The learned trial court erred in charging the jury that the conspiracy was one pursuant to which intoxicating liquor was to be shipped to Chicago and there distributed to persons who were not under the law entitled to receive the same.

B. The instruction was erroneous in that it omitted and misdescribed a necessary element of the crime, to-wit: beverage purposes.

1. A charge is erroneous which omits or misdescribes an element of the crime.

We take it to be elementary that a defendant cannot be convicted of any crime except that charged in the indictment, no matter how conclusive the evidence may be as to the commission by the defendant of some other crime. There is a clear distinction between the various crimes denounced by the National Prohibition Act. A casual reading of that act discloses, for instance, the crime of selling for beverage purposes, of selling for medicinal purposes without a permit, of selling for medic-

inal purposes without receiving a prescription from the buyer, etc.

In *State* v. *White*, 31 Kan. 342, 2 Pac. 598, the information charged that the defendant sold intoxicating liquor for other than medicinal, scientific or mechanical purposes contrary to the statute. The evidence showed that the defendant had sold intoxicating liquors for medical purposes upon affidavits authorizing sales for mechanical purposes. The trial court instructed the jury, in short, that such sales would authorize a conviction. In reversing the judgment because of the error in the instruction, the Court said, at page 345 of the official report:

> "Of course the defendant was guilty of an offense, under § 9 of the prohibitory liquor law of 1881, for selling intoxicating liquors in this manner; but the present prosecution is not a prosecution for any such offense. The present prosecution, as before stated, is for selling intoxicating liquors for other than medical, scientific or mechanical purposes, and is not a prosecution for merely selling such liquors for proper purposes in an irregular manner."

2. The conspiracy charged in the instruction was not the same as that charged in the indictment.

The learned trial court peremptorily instructed the jury (Rec. 293) that the shipment of liquor, its sale and possession in Chicago, was illegal unless such possession or sale was for medicinal purposes or sacramental uses. The court then stated to the jury the question in the case, towit:

> "Was there a conspiracy to thus violate the National Prohibition law?"

The indictment charged the defendants with conspiring to commit the offenses of purchasing without a permit, transporting without a permit and not for non-

beverage purposes, selling for beverage purposes and possessing for sale for beverage purposes. The instruction of the court amounted to this: That if the purpose was not medicinal or sacramental, it was therefore beverage. In view of the many other non-beverage purposes to which liquor may be put, we respectfully submit that the foregoing is a *non sequitur*. Under the indictment it was necessary for the government to prove the beverage purpose as part of the charge. If the proof had shown, and if the defendants had admitted, the transportation, sale and possession for culinary purposes without a permit, we take it that the evidence would not have proven the charge. The instruction of the court relieved the government from proving that the transportation, etc., of the liquor was for beverage purposes as distinguished from any other purpose.

The learned trial court further instructed the jury (Rec. 294) that the claim of the government was that a conspiracy was formed to violate the Act by causing a carload of whiskey to be secured, to be shipped to Chicago, and to be unloaded and distributed to persons who were not under the law entitled to receive the same. The point is made that, under that presentation of the charge against the defendants, the government was relieved of the necessity of proving that one of the objects of the conspiracy was the sale in Chicago, because the word "distribution" has a more extensive meaning than "sale" and includes every transaction whereby liquor could be manually transferred from one person to another. The charge also shifted the test of guilt, which was no longer to be the intent or purpose of the defendants, but was to be the fact that the recipients of the liquor in Chicago were not authorized by law to receive it. We do not deem it necessary to make further comment upon the fact that the jury, under these instructions, was

authorized to convict the defendants of a crime other than the one charged in the indictment.

3. The error in the instruction was not, nor could it be, cured by another correct instruction.

The learned trial court failed to give, anywhere in its instructions, a proper description of the charge against the defendants as the same was contained in the indictment. An erroneous instruction is presumed to result in error (*Mills* v. *U. S.*, 164 U. S. 644, 649; *Commonwealth* v. *Ross*, 266 Pa. 580, 583, 110 Atl. 327, 328). The point cannot be here raised that the erroneous instruction was cured by another and correct instruction, for no such instruction was given.

We therefore respectfully submit that the defendants have been prejudiced by the giving of the improper instructions complained of.

In conclusion, on this point, we therefore respectfully submit that, because of an erroneous theory, which was fundamental, the learned trial court fell into grave error

(1) In declining to admit evidence to prove the extensive liquor traffic carried on by the approvers;

(2) In declining to admit evidence to show that Joy had sought to influence a witness;

(3) In giving the instruction on accomplices complained of;

(4) In failing to recognize that approvers, as witnesses, are in a class by themselves and in failing to give requested instruction "C";

(5) In refusing to permit the defense to prove a variance;

(6) In misdescribing the charge in the indictment; and

(7) In declining to charge the jury on the theory of the defense, to charge on the evidence which was in the record, that the approvers could be considered to the extent to determining whether they or the defendants had committed the crime.

Point IV.

The evidence does not prove the commission of any one of the overt acts charged in the indictment.

The overt acts charged in the indictment (Rec. 3-4), insofar as we are now concerned therewith, were as follows, to wit:

> 1. Said Michael Heitler, Nathaniel Perlman and Mandel Greenberg, on to wit, September 25, 1920, at Chicago aforesaid, collected a large sum of money, to wit, $135,000.00 from said James O'Leary, Thomas McLaughlin, Nicholas Ambrosi, Bryan Kane, Patrick Simmons, John H. McGovern, William E. McGovern, George F. Callaghan, Edward P. Graham, Samuel Block, Samuel J. Cohn, Joseph Marner, Harry R. Block, and Max Wagman.
>
> 5. Said Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Edward Smale, George Hans, Eugene McGaffrey, Morris H. Gindich, William A. Gorman, Timothy Judge, Joseph P. Galvin, Frank O'Hara, Henry P. Wissing, George F. Quinn, William J. Trudel, Frank McCann, James O'Leary, Thomas McLaughlin, Nicholas Ambrosi, Bryan Kane, Patrick Simmons, John H. McGovern, William E. McGovern, George F. Callaghan, Edward P. Graham, Samuel Block, Samuel J. Cohn, Joseph Marner, Harry R. Block, and Max Wagman, on October 1, 1920, at said Gresham Station, in Chicago aforesaid, unloaded said distilled spirits and intoxicating liquor from said Rock Island Car. No. 155,364.

The point here made was presented to the trial court by

1. Motions to direct a verdict at the close of the evidence for the United States (Rec. 160):

2. Motions to direct a verdict at the close of all the evidence in the case (Rec. 282-7); and

3. Defendants' requested instruction "B" (Rec. 306), which instructed, in short, that the jury could not convict unless they found that one of the overt acts charged in the indictment, describing them, had been committed as therein charged.

The learned trial court gave instruction "B", but with reference to overt act No. 5, qualified the instruction as follows (Rec. 306):

> "I want to say with reference to that last that it does not have to be shown that they personally picked up the cases and carried them out. They could have participated in unloading the freight car without personally having carried out the goods."

The errors complained of are the refusal of the learned trial court to direct a verdict as requested and the qualification by the learned trial court of defendants' requested instruction "B."

I.

The overt act is an element of the crime and, as such, at least one of the overt acts charged in the indictment must be proved as alleged.

The statute under which this prosecution was had (Sec. 37 of the Criminal Code), insofar as it here applies, is as follows:

> "If two or more persons conspire to commit any offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined," etc.

The elements of the crime of conspiracy, aside from time and place, are:

(1) Two or more persons;

(2) An agreement between them;

(3) The commission of a federal offense as the object or purpose of the agreement; and

(4) An overt act.

The overt act must be committed by a conspirator. Consequently, the dismissal from the case of the co-defendants Morris H. Gindich, O. H. Wathen and W. F. Knebelcamp removed from the case overt acts Nos. 2 and 3 and the learned court so instructed the jury (Rec. 306). For the same reason, the verdict of acquittal as to the defendant William Gorman (Rec. 308) removed from the case overt act No. 4. Overt acts Nos. 1 and 5, therefore, remain for consideration.

We appreciate the fact that the early view was that the overt act was merely evidence of the crime (*U. S.* v. *Britton*, 108 U. S. 199, 205), but this view paid too great attention to the common law and too little to the change made by the statute (*Hyde* v. *U. S.*, 225 U. S. 347, 359). The present view is that the overt act is a necessary element of the crime and without it there is no crime under this statute (*U. S.* v. *Rabinowich*, 238 U. S. 78, 86; *Ryan* v. *U. S.* (C. C. A.) 216 Fed. 13, 32; *Gruher* v. *U. S.* (C. C. A.) 255 Fed. 474, 476). As is the case with elements of every crime, the overt act must be charged in the indictment (*Pettibone* v. *U. S.*, 148 U. S. 197, 202; *Thomas* v. *U. S.* (C. C. A.) 156 Fed. 897, 906) and having been alleged, must be proved as alleged (*U. S.* v. *Hamilton*, Fed. Cas. 15288; *U. S.* v. *Ault*, 263 Fed. 800, 803).

II.

The overt act must be an act to effect the object of the conspiracy and cannot be the object itself. Under this head, consideration will be given to overt act number one.

The element now under consideration is defined in the statute as

(1) An act

(2) performed by a conspirator

(3) to effect

(4) the object of the conspiracy.

The overt act, insofar as we are concerned therewith, must be something which, when done, would tend to accomplish the object of the conspiracy (*Dealy* v. *U. S.*, 152 U. S. 539, 546) or must be directed toward the attainment thereof (*Lonabaugh* v. *U. S.* (C. C. A.) 179 Fed. 476, 479). It is not sufficient if the act merely follows the conspiracy in point of time (*U. S.* v. *Dowling*, 278 Fed. 630, 639). The allegations of the indictment, set forth in overt act No. 1, charged that Michael Heitler, Nathaniel Perlman and Mandel Greenberg collected $135,000 from fourteen named individuals, but the proof dwindled down to an attempt to prove the collection of $2,780 from but one, Nicholas Ambrosi.

For the convenience of the Court, we here summarize the evidence relative to this alleged collection:

A. Testimony of Joy:

(1) On October 1st, at 2:30 P. M. (Rec. 127), Ambrosi gave Joy and Miller $2,780 which they turned over to Heitler, Perlman and Greenberg in Ambrosi's presence. Joy gave Ambrosi a receipt (Rec. 124).

(2) Ambrosi gave the money to Miller and Miller gave it to Perlman (Rec. 138, 124).

(3) Ambrosi gave the money to Joy (Rec. 127).

(4) Joy gave Ambrosi's money to Miller and Miller gave Ambrosi a receipt (Rec. 137).

(5) Miller paid the money back to Ambrosi (Rec. 137).

(6) Miller paid back twenty-five per cent of the money and Heitler, seventy-five per cent (Rec. 138).

B. Testimony of Miller:

(1) Joy and Miller gave Ambrosi a receipt, which stated that he would get his money back if he did not get the liquor (Rec. 144).

(2) Miller did give Ambrosi back his money (Rec. 146).

(3) Miller did not give Ambrosi back his money (Rec. 150).

(4) Ambrosi did not give Miller any money, but gave it to Perlman in the presence of Joy and Miller (Rec. 150).

(5) Ambrosi was to get the whiskey from Joy and Miller (Rec. 150).

Omitting all reference to the testimony offered by the defense, which was that Ambrosi did not pay any money to anyone for whiskey, and confining our consideration to the evidence offered by the government, on that testimony, is it possible to surmise what really happened? Not only do the two witnesses fail to agree with each other, but neither one agrees with himself. From that testimony, either Ambrosi paid money to Joy and Miller, or he paid it to Perlman, or he did not pay any money

to anyone. The verdict of acquittal as to Ambrosi (Rec. 17) shows that the jury believed the last of these hypotheses. In fact, the only part of the testimony of these two witnesses which is not replete with self-contradiction is that Ambrosi was to get the whiskey from Joy and Miller and they, in fact, gave him a receipt for it. If such be the case, the overt act has failed of proof, because a collection from Joy and Miller is not a collection from Nicholas Ambrosi. Assuming, however, that Perlman did collect the money from Ambrosi, the testimony shows that the supposed collection was at 2:30 P. M. on Friday, October 1st. The act, then, could not be in effectuation of the purchase, which was one of the objects of the conspiracy, because that had been made several days before (Rec. 92); it could not be in effectuation of the transportation to Chicago, because the transportation was then almost at an end (Rec. 97) and the collection of money was entirely independent thereof; nor could it be in effectuation of the possession for sale in Chicago, for the reason that it was in itself a sale, which not only could not effectuate an antecedent possession for sale, but, in fact, made such a possession impossible. Can it then be an act to effect the sale in Chicago, or, in other words, can the object of the conspiracy be charged as an overt act? This Court has many times said that the overt act need not be the object of the conspiracy. We would go even further and say that in no event can it be.

The dictionaries give the meaning of "effect" as, to bring about, to produce as a result, to be the cause or producer of, etc. (*U. S.* v. *Ault*, 263 Fed. 800, 804). "Effect," then, connotes not only an object which is to be accomplished or achieved, but also something which is to do the accomplishing or achieving. This "something" is the overt act. In and of its very nature, the active or effecting part must be antecedent in time to the object

or thing effected and under no approved or existing meaning of the word "effect" can the object be also the active, effecting agent, or, in other words, can a thing effect itself.

We have been unable to find any case which is directly in point (but see *Hyde* v. *U. S.*, 225 U. S. 347, 259; *Lonabaugh* v. *U. S.* (C. C. A.) 179 Fed. 476, 479), although an indictment is defective if it appears that the overt act charged could not possibly effect the object (*U. S.* v. *Biggs*, 157 Fed. 264, 273; *U. S.* v. *Ault*, 263 Fed. 800, 803; *Tillinghast* v. *Richards*, 225 Fed. 226, 229). We are fortified in our position, however, by the fact that Congress has seen fit to add an element to the common law definition of conspiracy, which was "a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose * * *" (*Com.* v. *Hunt*, 4 Metc. 111, 123). When the overt act was added, without which there is no crime, the irresistible conclusion is that Congress intended this to be an additional element and not merely the object under a new name.

III.

The evidence does not prove the commission of overt act number five as alleged.

The overt act, insofar as we are concerned therewith, alleged that, at a certain time and place, Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Frank McCann, George Quinn and twenty-four named co-defendants "unloaded said distilled spirits and intoxicating liquor from said Rock Island Car No. 155,364."

The point here made is that the evidence does not prove that the said defendants, or any or either of them, "unloaded" said liquor from said car. Since no attempt was

made to prove that any defendants except Heitler, Perlman and Greenberg were even at the car, the evidence in regard to these three is all that is relevant.

A. The evidence adduced by the government relative to unloading before the holdups is as follows:

(1) Koeller and Fisher, unprejudiced witnesses, failed to identify either Heitler, Perlman or Greenberg as even having been at the car (Rec. 100, 142).

(2) Harry Frank saw Perlman, Heitler and Greenberg at the car. Perlman said "go and get your stuff there" and gave Frank the liquor (Rec. 114). Neither Heitler nor Perlman were helping to load; Greenberg was checking the goods (Rec. 118). Greengaard, who was right with Frank, saw Heitler, Perlman and Greenberg standing in the street near the car, five or six feet from it. They were not doing anything and he did not hear Greenberg say anything, nor did he see anyone on the ground checking (Rec. 121).

(3) Joy saw Heitler, Perlman and Greenberg at the car. Heitler went off with Sergeant Judge and when he returned, told Joy to "go ahead and load" (Rec. 124).

The most that can be said of the above testimony is that it shows that Heitler, Perlman and Greenberg were at the car. The testimony is positive as to the fact that neither Heitler nor Perlman were helping to load. There is testimony, though contradicted by Koeller, that Greenberg was on the ground checking.

B. The testimony as to the unloading after the holdups is as follows:

(1) Greengaard saw Heitler, Perlman and Greenberg at the car (Rec. 121).

(2) Frank, who was with Greengaard, saw Heitler

and Perlman at the car; no trucks were at the car (Rec. 118).

(3) When Joy returned to the car, Heitler "was unloading the last load on a machine" (Rec. 125) and said that he was busy loading up the truck (Rec. 135).

(4) Miller, who was with Joy, saw Heitler, Perlman and Greenberg at the car and Heitler "was loading up the last truck" (Rec. 145). Heitler was standing out in the street alongside of the truck, which was already loaded when Joy and Miller arrived (Rec. 146).

The above testimony shows that Heitler, Perlman and Greenberg were at the car and contains a few general statements about unloading. On cross-examination, however, the general expression "unloading" was so qaulified as to limit its meaning to mere presence beside a truck which someone had already loaded. It may be of interest to note that Koeller failed to mention on direct examination (Rec. 97-9) the above occurrences as detailed by the approvers. The defendants each denied that they were even at the car that night, and in this they were supported by the government witnesses Koeller and Fisher and by their own witnesses Wissing (Rec. 221), O'Hara (Rec. 223), Lynch (Rec. 227), Cohen (Rec. 265), Stone (Rec. 186) and Rodkin (Rec. 206). No attempt was made to impeach these witnesses for the defense.

Assuming, however, as we must, that the above testimony of the approvers is true, that Heitler, Perlman and Greenberg, or either of them, were present, does mere presence constitute proof of unloading? Suppose we go further and assume that these three hired the men who did the actual unloading, which is not shown by the testimony. Does this added fact show an unloading?

In overt act No. 3, the allegation is that Wathen and Knebelcamp *caused* the liquor to be loaded onto the car

and the testimony was that their employees did the actual loading (Rec. 93-95). In overt act No. 5, the allegation is that Heitler and others *unloaded* the liquor, not that they *caused* it to be unloaded, or "participated in unloading the freight car," and the testimony, together with the assumption, shows merely that they *caused* it to be unloaded, their employees doing the actual unloading. One who hires an agent may be said to have caused the act done by the agent, but he cannot be said to have done it. We respectfully submit that no reason exists for not recognizing and applying the distinction in the case of this indictment, which, by its own allegations (overt acts Nos. 3 and 5) clearly shows that the distinction was known, understood and followed.

It is, therefore, respectfully submitted that, for the reasons above stated, the indictment has failed of proof.

Point V.

The remarks of counsel for the government during argument constitute reversible error.

At the close of all the evidence, Assistant District Attorney Kelly addressed the jury on behalf of the government, and in the course of his remarks said:

> "Now, we will take the case of Mandel Greenberg. We have shown by the testimony of Mossy Joy, and Miller, and Moore, that Mandel Greenberg was one of the Big Three in this conspiracy, notwithstanding the fact that Mandel Greenberg presented a framed alibi for the consideration of this jury (Rec. 287).
>
> If you have any tears, prepare to shed them now, Mike Heitler is ascending the witness stand. With measured tread and downcast eyes, Mike walks to the chair. You would think that Mike was going to the electric chair, he is so shocked. In answering questions of his counsel, he is meek and humble, 'Yes, sir, no sir.' Why, it is not the same man that threatened Morris Frank with death in the Englewood Station. It is not the same King of the Underworld, who, by the snap of his finger, holds the lives of men in his grasp (Rec. 288).
>
> Mike is true to his type, yellow, when he is cornered, resorting to any means to get out of a tight place.
>
> If all the tears that Mike caused were gathered in one reservoir, Mike Heitler could swim in it.
>
> Mike was playing a part when he sat in this witness chair. He is a great actor. He wanted to impress and show you how meek and humble he is.
>
> How much like Shylock Mike looked. He demanded his pound of flesh and he bled his victims (Rec. 289).
>
> The evidence shows here that Mossy Joy got back his diamonds, his stick pin and his ring, and he got them back after he made this demand on Heitler. Now, if Heitler had nothing to do with this, how could Heitler have gotten him back his diamond ring and his stick pin?" (Rec. 290).

Objection was duly made to all of the foregoing statements, and the rulings of the court thereon were as follows:

(1) To the statement that Mandel Greenberg presented a framed alibi, the ruling was that the argument was proper.

(2) To the allusion to Mr. Heitler as King of the Underworld, the ruling was that the statement was improper.

(3) To the statement that if all the tears that Mr. Heitler had caused were gathered in one reservoir, he could swim in it, the ruling was that the argument was proper. In the charge to the jury, the court did, however, say (Rec. 296):

> "Any reference by the prosecuting attorney to this man's (Heitler's) activity outside of this case was improper and I again admonish you to ignore it.
>
> During the argument of the parties, some reference was made and the statement made by one of the counsel as to tears having been shed. I do not believe I understood the counsel who made the statement at the time, I am not sure; but I want to now at this time again admonish you that anything outside of this record, outside of what was received on the trial is not proper."

(4) To the remark of counsel that Mr. Heitler resembled Shylock and demanded his pound of flesh and bled his victims, the court said that the argument was proper so far as it was a comment upon appearance, manner or anything disclosed by testimony, and continued (Rec. 289):

> "I wish to say, however, that if any of you think there is any reference to religion in the statement, that you will not decide this case upon race or religion. They are all in the same position. Race and religion, of course, have no bearing in this case any more than sympathy or prejudice."

During the argument of Mr. Symmes to the jury, the court further said (Rec. 290):

> "I now think that remark of Mr. Kelly's was improper, as to any reference to a Shylock, or the demanding of a pound of flesh. There is nothing that justifies it. * * * It is entirely unworthy to make remarks about any man's religion, or demanding any pound of flesh."

The court also charged the jury as follows (Rec. 301):

> "Be not swayed, then, by prejudice for or against anyone because of his race or his religion."

Mr. Kelly, immediately after making the statement, disclaimed any intention of bringing into the case anybody's race or religion.

(5) To the remark of counsel relative to Mr. Heitler's procuring the return of Mossy Joy's diamonds, the ruling was as follows (Rec. 290):

> "I think that the jury will have to pass on that question, too."

I.

The remarks of counsel were improper.

A. Remarks dealing in personalities.

Remarks and statements relative to physical appearance, race, religion, station in life or occupation, when such facts are not in issue in the case, are made with but one object in view, namely, to arouse in the minds of the jurors an emotion which will be favorable to one side or prejudicial to the other. For instance, in *Hall* v. *U. S.*, 150 U. S. 76, the district attorney, in his argument to the jury, said that the defendant had come to the Indian country from Mississippi with his hands stained with the blood of a negro, and that the killing of a negro in Mississppi, for which the defendant had been tried

and acquitted there, was murder. Another instance of such an argument occurs in *Lowdon* v. *U. S.* (C. C. A.) 149 Fed. 673, where the district attorney told the jury that if a juror decided that the defendants were not guilty, when he returned home, his neighbors might conclude that

> "the jingle of the broken bankers' unlawfully and illy-gotten gold in his pocket"

had influenced his action and decision. As was said by Circuit Judge Sanborn in *Union Pac. R. R. Co.* v. *Field* (C. C. A.) 137 Fed. at page 16:

> "It is exceedingly difficult to withdraw from the minds of jurors, or from any mind, suggestions of immaterial facts, insinuations of misleading rules of action, or arguments which arouse passion or prejudice; and yet in cases in which the address of counsel conveys suggestions of this nature to the minds of the triers of the facts it is only when it is certain that these have been withdrawn that the trial is fair and impartial."

A jury hearing an impassioned and vindicative argument, which characterizes a defendant as a King of the Underworld, a Shylock bleeding his victims, as the causer of many tears—a jury hearing such argument might struggle to free their minds from prejudice, but the mere fact that such statements and insinuations had been made must find lodgement in their minds and they cannot, no matter how conscientiously they may try, entirely free themselves from the effect of such statements (*Latham* v. *U. S.* (C. C. A.) 226 Fed. 420, 425).

The learned court in its opinion said (Rec. 39):

> "At the time the court was under the impression that an experienced counsel was endeavoring to embarrass the speaker who was inexperienced in presenting a case to the jury. Scarcely a thought was presented without interruptions and challenged."

We respectfully submit that argument of this kind should be interrupted and should be challenged.

It was truly said by District Judge Call in *Latham* v. *U. S.*, 226 Fed. at page 425:

> "The prosecuting officer is usually a person of considerable influence in the community, and the fact that he represents the government of the United States lends weight and importance to his utterances. He does not occupy the position of a defendant's counsel, but appears before the jury clothed in official raiment, discharging an official duty."

A remark, which might not be prejudicial when stated by counsel in a cause between individuals, may very well be highly prejudicial when stated in a cause wherein counsel makes the remark as a representative of, and on behalf of, the United States.

Before passing to a consideration of these remarks, we wish to correct the impression given by the learned trial court (Rec. 41) that the defendants were so satisfied with the impression left by the government prosecutor that they considered the advisability of waiving argument. We respectfully beg to state that the defendants, whatever might be said of co-defendants, at no time considered or thought of waiving argument.

There is absolutely nothing in the record on which to base the statement that Mr. Heitler was a

> "King of the Underworld, who by the snap of his finger holds the lives of men in his grasp."

The learned trial court, in its opinion, in speaking of this remark, said (Rec. 40):

> "There was testimony that he (Heitler) had run various places and that some at least had been closed up because of their bad repute."

We respectfully submit that there is not a word in this record to show that the police, or anyone else, had ever

closed any place run by Mr. Heitler because of its bad repute or for any other reason. The statement of counsel was not based on evidence in the case and was made solely for the purpose of prejudicing the jury against Mr. Heitler. It is safe to assume that it had the effect which Mr. Kelly intended and desired.

The remark that Mr. Heitler had caused so many tears that he could swim in them if they were gathered together in a reservoir was obviously an attempt to play upon the passions of the jury. A similar attempt was made in the case of *Ivey* v. *State,* 113 Ga. 1062. The defendant was indicted for the sale of liquor contrary to law and the district attorney, in his remarks to the jury, said:

> "Gentlemen of the jury, if you could go over this town and see the good mothers whose pillows have been wet with tears over their boys who have been intoxicated by the acts of this woman."

The remark was objected to, but the objection was overruled, and the judgment of conviction was reversed on appeal because of this error.

The remark that Mr. Heitler resembled Shylock, that he demanded his pound of flesh and bled his victims, was another remark whose only purpose could have been to arouse prejudice in the minds of the jury. The learned trial court, perhaps to justify this remark, said in its opinion (Rec. 40):

> "In the present case, witnesses testified that Heitler, Perlman and Greenberg bought a carload of whiskey for $32,000 and sold it to bootleggers for $135,000; requiring the purchasers to pay cash in advance; that they gave no receipts for moneys advanced and did not bind themselves to deliver any particular grade of whiskey, and this, all in violation of the law of the land."

With great respect, we beg to say that not a single witness connected Heitler, Perlman and Greenberg, or any

of them, with the purchasers of this carload of whiskey. Nor did a single witness testify that these defendants had sold it to bootleggers for $135,000. The record shows the price alleged to have been paid to them by Joy and by the Franks, but that is all. The testimony shows that no receipts were demanded and, with the exception of Joy's statement that Heitler would not tell him what particular kind of Louiville whiskey he would get, the record is silent as to the fact that these three defendants did not bind themselves to deliver any particular grade of whiskey. Assuming, however, that everything testified to by the approvers was true and that the above quoted statement of the court was supported by the evidence, can the fact that these defendants drove a hard bargain with the approvers furnish any excuse or justification for assuming that the approvers were victims and that, therefore, the argument was proper that Heitler had bled his victims?

B. Remarks purporting to deal with the evidence in the case.

The statement that the alibi presented by Mandel Greenberg was "framed" was improper for the reason that Mr. Kelly thereby decided a question of fact which should have been left to the jury. It would have been proper for Mr. Kelly to show that the facts set up in the alibi were not so, or to advance reasons for believing that the witnesses had testified falsely or mistakenly, but it was not proper for him to resolve the doubt and take the question from the jury. The truth of the matter was, Greenberg's alibi was perfect. His witnesses could not be shaken by cross-examination, nor could the government discover any interest which they had in the case (except the few who were related to Greenberg), nor could the government unearth any such attempts at subornation as Joy had been guilty of. The government,

of necessity, *had* to resolve the doubt and dismiss the question without argument. But the exigencies of a lawsuit furnish no excuse for such conduct on the part of the government prosecutor.

The question addressed to the jury by Mr. Kelly relative to the return of Mossy Joy's diamonds was a statement that Mr. Heitler had gotten Joy's diamonds back for him. There is not one word in this record to show that Mr. Heitler, or any of the other defendants, had anything whatsoever to do with, or were in any way responsible for, the return of those diamonds. All that is said about the return of the diamonds (Rec. 124-125) is that an unidentified fellow came to Joy's home and handed him a package wherein he found his diamond pin and ring.

II.

The remarks could not be, nor were they, cured by the instructions.

A. Remarks to which the court sustained objection.

We believe that this Court can appreciate, without extensive argument on our part, that this is a case in which it was easy to arouse prejudice. The three principal defendants were Jews and there is much in the record, from the mouth of Mossy Joy, accusing Heitler of having held up the trucks and stolen the whiskey. We respectfully submit that in this case, any instruction which the court might have given to the jury to disregard the statement that Mr. Heitler was a causer of tears, a King of the Underworld and a Shylock who demanded his pound of flesh and bled his victims, could not remove those statements from the minds of the jury.

B. Remarks to which objection was overruled.

The court overruled the objection to the remark of Mr. Kelly which, in effect, stated that Heitler had caused the return of Joy's diamonds and overruled the objection to the statement that Mandel Greenberg's alibi was "framed." Permission to make the comment upon Heitler's causing the return of the diamonds was equivalent to instructing the jury that they could take that fact into consideration (*Graves* v. *U. S.*, 150 U. S. 118, 121). As we have heretofore shown, there was no such fact in evidence.

To the reference that Mr. Heitler had caused so many tears to be shed that he could swim in them if they were gathered together in one place, the court first overruled the objection, and later, in the charge to the jury, made mention of the fact that a statement was made about tears having been shed and continued (Rec. 296):

> "I do not believe I understood the counsel who made the statement at the time, I am not sure; but I want to now at this time again admonish you that anything outside of this record, outside of what was received on the trial is not proper."

We respectfully submit that this general admonition, which did not even instruct the jury that the causing of tears was not in the record, was entirely insufficient to overcome the prejudice caused by the remarks of counsel, and was, in effect, no instruction on the point.

We therefore respectfully submit that the defendant Heitler, and the other defendants because of their association with him, was greatly prejudiced by the highly inflammatory remarks of counsel in argument to the jury and that the effect of these remarks could not be removed by any instruction which the court might have given.

Point VI.

There is no evidence in the record to prove the crime as charged, to wit: a conspiracy to commit all four crimes charged as having been the object thereof.

The learned trial court overruled the motions for a directed verdict (Rec. 160, 287) and overruled the motions for a new trial (Rec. 46) made by the respective defendants.

We will discuss all the evidence in the case as the government, after the close of its case in chief, did not introduce any evidence, so far as this point is concerned, to connect the defendants with the crime charged in the indictment.

I.

The government, having charged a conspiracy to commit four offenses, must prove that the conspiracy did, in fact, have as an object the commission of all four offenses.

A. The object of the conspiracy is an element of the crime and must be proved as alleged.

We do not believe it necessary to cite the Court to an imposing array of authorities to sustain the point that the object is an element of the crime (5 R. C. L. 1087; 12 C. J. 627). Being an element of the crime, it must be alleged in the indictment, and, having been alleged, it must be proved.

B. If the indictment charge a conspiracy to commit four offenses and the proof show a conspiracy to commit but one, two or three of said offenses, the proof has not sustained the allegations of the indictment.

1. To constitute a conspiracy, there must be a specific intent, which must be common to all conspirators and which must be alleged in the indictment.

The crime of conspiracy is principally mental, with the exception of the overt act, and the very word itself connotes an intent to effect the object (*Frohwerk* v. *U. S.*, 249 U. S. 204, 209). This intent must be a specific intent directed to the accomplishment of the object, whatever that object may be. Thus, in the instant case, we find the co-defendant Gorman was acquitted by the jury, although it was admitted by him that he identified Berkson to Koeller and thereby enabled Berkson to obtain possession of the carload of whiskey. The question was whether Gorman had the specific intent required to make him a guilty party or whether his intent was merely to assist Berkson, a casual acquaintance, to obtain identification. We also take it that if a detective had joined the band of conspirators for the purpose of discovering the guilty parties and frustrating them, he would not be a conspirator because of lack of intent, notwithstanding that he may have committed any one of the overt acts. This intent must also be common to all conspirators. It needs no citation of authority to sustain the point that an indictment would be bad on demurrer if it charged A and B with the offense of conspiring to commit fact "X," B and C with conspiring to commit fact "Y" and A and C with conspiring to commit fact "Z." It would be bad because it joined three offenses, but the reason it joined three offenses is because there were three different intents and no common intent. Assume now, that the indictment charged that A, B and C conspired to purchase liquor unlawfully; that A, B and D conspired to transport it unlawfully and A, B and E conspired to sell it unlawfully. We are unable to distinguish this assumed case from the preceeding one. There seem to be three

separate crimes charged as the respective objects of three separate conspiracies, there being no allegation connecting the three conspiracies in any way, and the fact that A and B happened to be parties to three conspiracies could not make one conspiracy out of three. Assume now, that the indictment charged that A, B, C and D conspired to unlawfully purchase, transport and sell intoxicating liquor. The indictment is good, but if the proof show the existence of three separate conspiracies, the situation is exactly the same as if the indictment had specified the three separate conspiracies, and the defendants could not be convicted.

2. If the proof show a different intent, whether as to the means employed or the object, the indictment has failed of proof.

Unquestionably, if an indictment charge a conspiracy to commit fact "X" it would not be supported by proof of a conspiracy to commit fact "Y," nor would a conspiracy to commit fact "X" by means "A" be proved by evidence of a conspiracy to commit fact "X" by means "B" (*Rabens* v. *U. S.* (C. C. A.) 146 Fed. 978; *Lawrence* v. *State*, 103 Md. 17, 63 Atl. 96; *People* v. *Brown*, 159 Ill. App. 396; *Lowell* v. *People*, 229 Ill. 227, 82 N. E. 226; *Commonwealth* v. *Harley*, 48 Mass. 506; *State* v. *Hadley*, 54 N. H. 224).

3. We come now to the proposition at issue, namely, does the proof fail if it shows, not that the object of the conspiracy proved was entirely different from the object charged, but, the object being charged as 1, 2, 3 and 4, that it was merely 1 or 2 or 3 or 4?

Our research has disclosed no authority in point either way.

In *Rex* v. *Pollman*, 2 Campb. 229, however, the indictment against the defendants charged that they

unlawfully and corruptly did meet, combine, con-

> spire, consult, consent and agree among themselves, and together with divers other evil disposed persons to the jurors unknown, unlawfully and corruptly to procure and obtain, receive, have, and take, to-wit, to the use of them the said F. P., J. K., and S. H., and of certain other persons to the jurors likewise unknown, a certain large sum of money, to-wit, the sum of £2,000 * * *.

The money was to be received in return for procuring an office for one Hesse. The proof showed that a co-defendant, one Watson, knew that the money was to be paid to Pollman and Keylock, upon Hesse's appointment, but there was no evidence to show that he knew that Sarah Harvey was to share in the money or that she had anything to do with the transaction. In directing a verdict of acquittal as to Watson, Lord Ellenborough said, at page 233:

> "The question is, whether the conspiracy, as actually laid, be proved by the evidence. I think, that as to Watson, it is not. * * * You must prove that all the defendants were cognizant of the object of the conspiracy, and the mode stated in the indictment by which it was to be carried into effect. A contrary doctrine would be extremely dangerous."

The case of *O'Connell* v. *The Queen*, 11 Cl. & F. 155, was one of the most important cases, politically, ever decided by the House of Lords. It will be remembered that this was the case in which Lord Brougham, dissenting, with difficulty restrained the lay lords from overruling the decision of the law lords and from voting in favor of an affirmance. The argument was heard in the House of Lords before the Lord Chancellor, Lord Brougham, Lord Denman, Lord Cottenham and Lord Campbell. The judges were summoned and Mr. Chief Justice Tindal, Mr. Justice Patteson, Mr. Justice Williams, Mr. Justice Coleridge, Mr. Justice Coltman, Mr.

Justice Maule, Mr. Baron Parke, Mr. Baron Alderson and Mr. Baron Guerney accordingly attended.

The indictment had charged as follows:

Count 1. That the defendants did conspire with persons unknown:

A. To create discontent among the subjects of the Queen,

B. To excite such subjects to seditious opposition,

C. To stir up hatred between English and Irish,

D. To excite discontent in the English army,

E. To cause seditious assemblies, and

F. To bring the courts of law into disrepute.

Certain overt acts were alleged which are not here important.

Count 2. This count was the same as count 1, except that it omitted the allegations of the overt acts.

Count 3. This count was the same as Count 1 in substance, though charged in slightly different language.

Count 4. This count was the same as Count 3, except that it omitted objects D and F.

The remaining counts are not here material. The findings of the jury were as follows:

Counts 1 and 2:

A. All defendants were guilty of conspiracy to commit objects A, B and C.

B. One defendant was not guilty as to objects D, E and F.

C. Seven defendants were guilty as to objects D and E only.

D. Three of the seven defendants were also guilty of conspiring to commit object F.

The same general character of finding was also returned as to Counts 3 and 4.

The Lord Chancellor propounded certain questions which were submitted for the consideration of the judges, to-wit (page 231):

> "2. Is there any, and if any, what, defect in the findings of the jury upon the trial of the said indictment, or in the entering of such findings?"

Lord Chief Justice Tindal delivered the opinion of the judges in answer to the second question, holding that the verdict could not be supported because it was a finding of several conspiracies, saying, page 237:

> "And the reason and ground for such opinion is this: That as each count of the indictment charges one conspiracy or unlawful agreement, and no more than one, against all the defendants in such count, so the jury could find only one conspiracy or unlawful agreement on each separate count; for though it was competent to the jury to find one conspiracy on each count, and to have included in that finding all or any number of the defendants, yet it was not competent for them to find some of the defendants guilty of a conspiracy to effect one or more of the objects stated, and others of the defendants guilty of a conspiracy to effect others of the objects stated; because that is, in truth, finding several conspiracies, on a count which charges only one."

The opinion of the majority of the judges was accepted in answer to question No. 2.

We respectfully submit that this case decides that a conspiracy to commit part of the objects named is not the same conspiracy as one to commit all of the objects named.

In the *O'Connell* case, the true state of the jurors' minds appeared from the verdict. Assume, however, a case as follows:

A. The indictment: The indictment charges a conspiracy to commit four offenses, to-wit: offenses A, B, C and D.

B. Evidence: There is some, but conflicting, evidence that, as a result of an agreement, offenses A, B, C, and D were to be committed.

C. Instructions of the court: The court instructed the jury as follows: "You will find the defendants guilty if you find that they conspired to commit *any one* of offenses A, B, C, and D."

D. Opinions of the jury:

(1) Three jurors think the defendants conspired to commit offense A. Nine of the jurors dissent, but think they conspired to commit one of the offenses B, C, and D.

(2) The second three jurors think the defendants conspired to commit only offense B, the other nine dissenting.

(3) The third three jurors think the defendants conspired to commit offense C, the nine others dissenting.

(4) The fourth three jurors think the defendants conspired to commit offense D, the nine others dissenting.

E. Query: What is the verdict? If a vote be taken before discussion, the verdict must necessarily be one of guilty, in which case the defendant has been convicted by a jury of three men, not of twelve.

It is respectfully submitted that the court must charge the jury, either that the jury may convict if they find a conspiracy to commit any one of the offenses, or that, before convicting, they must find a conspiracy to commit all of the offenses. The general charge, that the jury

may convict only if they find the defendants guilty of the conspiracy charged in the indictment, leads right back to the question now at issue by virtue of the fact that, resulting from such general charge, is the question, what is the conspiracy charged in the indictment? If the charge be that the defendants can be convicted if they conspired to commit any one of the objects, how is the jury to determine, as in the *O'Connell* case, which particular set of defendants to convict and which to acquit?

In the *O'Connell* case, there was no rule of law requiring the jury to return a special verdict nor, in the assumed case, is there any rule of law requiring a jury to enter upon a discussion before taking a vote as to their verdict. It is respectfully submitted that if the defendants can be convicted of a conspiracy to commit part only of the objects charged in the indictment, either or both of the above results may result in any case wherein the defendants number more than two. It is further respectfully submitted that such should not be, and is not, the law.

II.

There is no evidence in the record to prove that any conspiracy existed to commit all four offenses.

In considering this point, we will entirely omit from consideration all evidence introduced on behalf of the defendants, since the question is, Is there any evidence?

The theory of the government obviously was that Heitler, Perlman and Greenberg conspired to cause the liquor to be purchased in Kentucky and transported to Chicago, to sell it in Chicago and to possess it for sale in Chicago. To prove the existence of a plan or scheme, it is not enough to show merely that isolated facts occurred at various intervals in point of time. The government must

produce evidence to connect the defendants with the plan as charged. This has not been done. There is no evidence which tends to make it any more reasonable to believe that the defendants were connected with such a plan or that such a plan existed than that Berkson conceived the original plan of purchasing and transporting and that he sold the liquor to the defendants in transit. There is not even any evidence in the record which connects the defendants with three out of four offenses, although there is some evidence, if the approvers be believed, that they conspired to sell.

A. There is no evidence in the record to prove that the defendants conspired to purchase intoxicating liquor from the old Grand Dad Distillery, etc., without first obtaining a permit.

There is no evidence in this record to show that McCann and Quinn even knew that the liquor had been purchased. The only evidence appearing in the record to connect Heitler, Perlman and Greenberg with the purchase of the whiskey is the various statements that some of them at various times are supposed to have said that they had whiskey coming. There is nothing in the record to show, however, that they had anything to do with the purchase of it from the Old Grand Dad Distillery Company. The record is entirely silent as to any connection between the defendants and Berkson, the purchaser, at or before the time of purchase.

B. There is no evidence in the record to prove that the defendants were parties to any conspiracy to transport the said intoxicating liquor from Hobbs, Kentucky, to Chicago, without obtaining a permit and for beverage purposes.

There is absolutely nothing in the record to show that Quinn and McCann even knew that the whiskey had been transported.

The only transportation shown by this record is a transportation by the mysterious Max Berkson, who is not connected in any way with the defendants.

C. There is no evidence in the record to prove that the defendants conspired to possess said liquor for sale in Chicago, for beverage purposes.

There is absolutely no evidence in this record to show that Quinn and McCann even desired to possess this liquor for sale in Chicago or anywhere else.

If the story of the approvers be taken at its face value as to Heitler, Perlman and Greenberg, which was that the whiskey had been disposed of by them before its arrival in Chicago, in view of the efforts of these three to sell the whiskey before its arrival in Chicago, as the same have been narrated by the approvers, the only reasonable deduction to be drawn from the testimony is, that if there was any one thing that these alleged conspirators did not agree to do or desire to do, it was to possess this liquor in Chicago.

Assuming, however, that evidence did exist to show possession as one of the objects, can it be said that the possession was a possession for sale? The record, in view of the assumption, would disclose a possession for delivery, perhaps, but not one for sale. This part of the case can only be made out by assuming that, since the defendants sold the liquor before its arrival, if they had not sold it, they would have taken possession of it on arrival, and if they had taken possession of it, they would have held it for sale and not gift, barter, exchange or personal use. This, we submit, is conjecture, not evidence.

Where the indictment charges that an act is done with a certain intent, the intent is that of the doer of the act. So in the case of a sale for beverage purposes, the in-

tent is that of the seller (*People* v. *Thompson*, 147 Mich. 444, 11 N. W. 96; *People* v. *Hinchman*, 75 Mich. 587; *King* v. *State*, 58 Miss. 737). In fact, the only time the intent of any other party becomes material is when it appears conclusively that the recipient in fact intended a lawful use (*Commonwealth* v. *Joslin*, 158 Mass. 482, 33 N. E. 653; *State* v. *Shinn*, 63 Kan. 638, 66 Pac. 650).

In *State* v. *Lesh*, 27 N. D. 165, 145 N. W. 829, the defendant was charged with unlawfully keeping intoxicating liquors for sale as a beverage. On appeal, the judgment of conviction was reversed on the ground that the court had in effect charged the jury that the defendant could be convicted of keeping intoxicating liquors for sale as a beverage if they found from the evidence that he sold them in violation of his permit, the Court saying, page 175:

> "* * * one charged with keeping liquor for sale as a beverage should or could hardly be found guilty of such a crime on the mere proof that he has neglected to comply with the conditions of the druggist's permit in making a sale, or has sold under such permit, or has kept intoxicating liquors to be sold thereunder, unless he has actually kept or sold such liquors as a beverage. Defendant, in short, was not charged with any technical violation of the terms of his permit, but with *keeping intoxicating liquors for sale as a beverage.*"*

It is true that the Prohibition Act (Section 33) raises a presumption from the possession of liquor by any person not legally permitted under Title II to possess liquor, but this presumption is merely that the liquor is

> "kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title."

In other words, the presumption is that the liquor is to be used in the commission of a crime, but not of any

*Italics the Court's.

particular crime. We do not understand that the government may accuse a defendant of a crime, offer proof that he has committed one out of five possible crimes, but not particularly the crime with which he is charged, and then throw upon him the burden of disclosing the particular crime which he actually committed (*People* v. *Stedeker*, 175 N. Y. 57, 68, 67 N. E. 132, 136). The burden of proving the crime is upon the government and this burden cannot be thrown upon a defendant by any such specious use of presumptions.

We respectfully submit, therefore, that the government has failed to show that the defendants, or any of them, were parties to any such conspiracy as is charged in the indictment.

In conclusion, we respectfully submit that the several judgments of conviction should be reversed and the causes remanded with directions to dismiss the indictment, for the reason that the plaintiffs in error can never be convicted under the indictment herein, based as it is upon an unconstitutional statute.

If, however, this Court shall hold that the statute here in question is constitutional, then we further respectfully submit that, because of the many errors apparent in the record, the several judgments of conviction should be reversed and the causes remanded with directions to grant a new trial to each of the plaintiffs in error.

Respectfully submitted,

Maynard Kirkham

Attorney for the Plaintiffs in Error.

Robert H. Golding

Of Counsel.

APPENDIX.

I.

The story as told on the witness stand by unprejudiced government witnesses and by witnesses for the defense.

The story of the case opens on September 24th, 1920, when two men, who might have been Jews, Italians or Greeks, appeared in the office of the Old Grand Dad Distillery Company in Louisville, Kentucky, and opened negotiations for the purchase of one thousand cases of whiskey. One of them introduced himself as Max Berkson, and, after three days spent in negotiation with Mr. Wathen, an officer of the distillery and a co-defendant, the purchase was consummated (Rec. 92), the two men exhibiting at that time a permit which it is conceded was fraudulent (Rec. 159). The two men then disappeared and no one knows where they came from, where they went, or who they were, but we do know that neither of them was Michael Heitler, Nathaniel Perlman or Mandel Greenberg (Rec. 96). The whiskey was then loaded on Rock Island car No. 155364, which was consigned to Peoria, Illinois (Rec. 93), where it was met by an individual who said he was Max Berkson, the consignee, who reconsigned the car to Gresham Station, Chicago (Rec. 96, 97), where it was later to be unloaded.

About this time, Maurice John ("Mossy") Joy and John Miller, both government witnesses, came to Nathaniel Perlman, at the latter's saloon in Chicago, and Joy said that they would have a carload of whiskey about the last of the month, which they wanted to sell, but Perlman refused to buy (Rec. 239). Perlman had already been

informed by Moore, also a government witness, that Miller had a carload of whiskey for sale (Rec. 241), but as this event occurred in July or August, it probably was a different carload.

On October 1st, Nicholas Ambrosi had been to his bank to obtain money to enable him to cash checks for people in his neighborhood, and, on his way home, which led him past Perlman's saloon, stopped there in order to go to the toilet. His friend, John Robinson, also a witness, was with him. Ambrosi bought a cigar and a glass of near beer and while standing at the bar was approached by Miller, who said that he had some whiskey to sell, and who showed him a paper with a long list of names on it of people who were getting the whiskey. Ambrosi refused to buy, and went on his way (Rec. 209, 210, 213-4).

About 3:00 P. M., that same day, the carload of whiskey arrived at Gresham station, 85th and Vincennes, Chicago, where the mysterious Berkson again appeared, but could not obtain possession of the whiskey because of lack of identification (Rec. 97). He finally persuaded Gorman, a co-defendant who was acquitted by the jury and who was acquainted with him, to identify him, which Gorman did (Rec. 97-8, 161). It was at first thought that the unfortunate Gindich was Berkson, and in fact he was identified as such by several witnesses, including the inevitable handwriting expert, but he was later dismissed by the government (Rec. 10) when other witnesses stated positively that it was a case of mistaken identity (Rec. 162, 100). The unloading of the car commenced about 7:30 P. M., under the direction of George F. Koeller, the station agent at Gresham, who was practically the sole unprejudiced witness of any importance produced in this case by the government (Rec. 98-9). A convoy of trucks appeared to haul away the liquor, and among those present at the unloading, in addition to Berkson, were

Mossy Joy, John Miller, Harry Frank, Louis Greengaard and others, minor characters, all government witnesses (Rec. 124, 114, 154). Most prominent among them, however, was Mossy Joy, who had theretofore engaged the government witness Greenwald to haul liquor for him (Rec. 139), telling him that he had a carload of liquor at 63rd Street, and that he had a permit to haul the stuff (Rec. 140-1). Parenthetically, this was not the first time that Greenwald had hauled whiskey for Joy (Rec. 141). Joy was quite intimate with Berkson and stood by some of the trucks, checking the cases as they were loaded (Rec. 223, 224, 225, 227, 228). During the unloading process Sergeant Judge, also a co-defendant, appeared upon the scene and was led away by a man who wore a diamond ring and a diamond pin (Rec. 98, 100), ornaments the subsequent loss of which was deeply mourned by Mossy Joy. Koeller, the government witness, and witnesses Galvin, a police officer, and Wissing, O'Hara and Lynch, railroad detectives, were at the car part or all of the time it was being unloaded, but not one of them saw either Heitler, Perlman or Greenberg there (Rec. 219, 221, 223-4). The caravan of trucks then started from Gresham station, and several of them, including the trucks owned by the Fitzpatricks, the Franks and by Joy and Miller met with disaster in the shape of highwaymen, said to have been led by Sergeant Smale, who held up the drivers and made off with the contents of the trucks (Rec. 124, 114-5, 155). Joy then started upon a tour of the city to find out what had become of his whiskey, and, in the course of his journey, stopped at several saloons (Rec. 146), finally arriving at the saloon of Perlman, where he found Perlman behind the bar attending to his duties and Heitler in one of the settees playing cards with two other men, where he had been since early in the evening (Rec. 238, 249, 265). Joy, who was con-

siderably inebriated (Rec. 148, 238) and more or less upset because of the recent disaster with which he had met, immediately accused Heitler of having held up his truck and robbed him of his whiskey, demanded his whiskey back or the money which he had paid for it, and threatened to "jam" Heitler if he did not get it (Rec. 239, 254, 257, 250). So far as Joy was concerned, the case would have ended then and there if he had been paid his price (Rec. 132-3). Joy finally became so noisy that Perlman put everybody out on the street and closed his place (Rec. 257, 238).

The next day, which was Saturday, October 2nd, Ambrosi, who had been down town to see Alderman Powers about getting a job for one of his friends, again stopped in Perlman's. Joy and Miller, drunk, were there also, arguing and saying that they had lost their diamonds, a carload of whiskey and everything else. Ambrosi asked what they were raving about, and Miller said "You are a pretty lucky man; we lost everything." Miller asked Ambrosi what he would do, and Ambrosi replied that if he knew who had taken it he would make them bring it back, otherwise he would fix them. Ambrosi then departed (Rec. 209, 212). Joy again asked Perlman what he was going to do about the liquor, and said that Heitler and Perlman knew who the policemen were who held them up, and that they had better get him his whiskey or money or they were going to go through with what they had said the night before (Rec. 239). Joy and Miller then went to the Elks' Club, where they continued talking and arguing in loud tones about whiskey and about having been held up. Mr. Trudel called Sergeant Shea in an attempt to assist Joy in getting track of his whiskey, but Joy was so noisy that Sergeant Shea refused to have anything to do with his case, and Trudel, for his kindness, was slapped by Joy hard enough to be thrown to the floor.

McCann, who was about twenty years older than Joy (Rec. 134), then received a smash in the face. Joy went after Quinn, age fifty, but he ran (Rec. 229-30, 259-60, 262, 126). Then Joy said to Miller, "Come on, get out of here before I kill somebody," and the two went out (Rec. 264).

The story of the whiskey robbery appeared in the Chicago Tribune on Sunday morning, October 3rd (Rec. 278), and a copy of the edition lay on Capt. Ryan's desk in the Englewood police station when he called Joy, Miller, Mickey Frank, Michael Heitler, Nathaniel Perlman and others to the station (Rec. 149). As soon as Joy saw Heitler at the station, he immediately broke out in a foul torrent of abuse, which was so vile that the trial court stopped him in his repetition of it (Rec. 126, 134, 197). Joy threatened to "jam" Heitler unless he got his whiskey or his money and said "I have reached the station—I have come here to the station and I am going to go clear through with the whole affair. You had a chance to stop me, but you did not stop me before I got here. I am going clear through with it now" (Rec. 197). Heitler told Capt. Ryan that they were trying to "job" him and asked Frank if he had seen him within the last two weeks, to which Frank replied that he had not (Rec. 197, 251). Statements were taken from Mickey Frank, Joy and Miller, and Joy exhorted Miller to talk, saying, "You know those Jews have got our whiskey, why don't you go ahead and talk" (Rec. 198). Mandel Greenberg was not called to the station, nor did he know, until the middle of November, that he was supposed to be a party to any conspiracy or whiskey robbery (Rec. 176).

The government then started to investigate the case and called Mossy Joy, Miller, Mickey and Harry Frank, Louis Greengaard, Michael Heitler, Nathaniel Perlman, Mandel Greenberg and Nicholas Ambrosi. Mossy Joy

did not see the government attorneys until his own attorney had said to him, "It looks bad, if I were you I would go down and come clean" (Rec. 133). Mickey and Harry Frank and Louis Greengaard, who had the same attorney, did not see the government attorneys, nor would they say a word until their own attorney, after three conferences with Assistant District Attorney Kelly, had told them to tell what they knew (Rec. 104, 116, 121).

When, however, Perlman, Greenberg and Ambrosi were called by the government, each immediately went to see the federal authorities without having consulted an attorney or without taking an attorney with them (Rec. 240, 176, 209-10).

A few days after the hearing at the Englewood station, Heitler telephoned his home about 3:00 P. M., according to his custom, to see if his little girl had gotten home from school. His wife told him that Major Dalrymple, the prohibition officer, was looking for him. He immediately went to see him and was asked to return, as Dalrymple wanted some men "to look him over." To this Heitler agreed. He returned and was "looked over," but he did not take a lawyer with him, nor did he see one, either before the first or the second visit. Among those who "looked him over" were the witnesses O'Hara and Wissing, both of whom then told Agent Callahan that Heitler had not been at the car that night (Rec. 224, 221). About ten days later, Heitler telephoned his home at the usual time, and was told by his wife that the district attorney wanted to see him. He immediately went to see Mr. Clyne and was held by the officials for about sixteen hours. He was then asked to return the next day with Perlman, which he did. But still he did not confer with a lawyer (Rec. 251, 252).

II.

The story as told on the witness stand by Mickey Frank, Harry Frank and Louis Greengaard.

According to Mickey Frank, Perlman and Heitler came to Frank's coffee shop, formerly a saloon, about September 15th, and offered to sell him one hundred cases of whiskey (Rec. 101), although Frank had not sent word to them that he wanted any whiskey (Rec. 105), had never had any business dealings with Heitler and had only bought glassware from Perlman, a couple of years before that (Rec. 105). The conversation was held across the bar, in ordinary tones, in the presence of five or six men (not produced as witnesses), who, remarkable to relate, did not inquire, after Heitler and Perlman left, where they could get any whiskey (Rec. 105-6). Neither Harry Frank, Louis Greengaard, nor one Kiser was present. Nothing was said about the price of whiskey, and Frank refused to buy because he could not handle so many cases. He did not try to find purchasers for the whiskey, nor did he talk to his brother Harry, nor to Greengaard or Kiser about it. In fact, he gave no further thought to the matter until about a week later, when Heitler and Perlman again appeared unsolicited at his coffee shop. The second conversation was also held across the bar in the presence of two or three men (not produced), but, as before, neither his brother, Greengaard nor Kiser were present. Heitler and Perlman offered the whiskey at $130 per case, and guaranteed protection from interference by city and federal authorities (Rec. 106). Frank thereupon gave them an order for one hundred cases, of which he, Harry Frank, Greengaard and Kiser were each to have twenty-five. Frank here repeatedly changed his previous testimony and said

that the fact was that Heitler and Perlman did mention the price at the first visit and that he, Mickey, did speak to his brother, Greengaard and Kiser before the second visit, and they agreed to take twenty-five cases each, which was the reason he changed his mind and bought the whiskey (Rec. 106-8). But Harry Frank contended that it was not until September 30th that he first heard about the whiskey deal (Rec. 116), and Greengaard said that he knew nothing of it until September 30th or October 1st (Rec. 119-20).

Mickey Frank said that on Friday, October 1st, between 9:30 and 10:00 A. M., before he heard from Perlman, he collected $3,250 from Kiser in the presence of Greengaard, who said nothing at the time, but who paid him a like sum half an hour later. He did not remember whether or not his brother Harry was present at that time. Mickey Frank then said that the fact was that Greengaard and Kiser did say something about the whiskey, and further stated, both that Greengaard had his money with him and that he did not have his money with him, but went and got it. Mickey also stated, both that Harry Frank paid him $3,250 after Kiser did and that Harry Frank did not pay him any money but that he, Mickey, drew it out of the bank himself. Upon further questioning, Mickey Frank stated that Kiser and Greengaard did not pay the money to him, Mickey, but paid it to his brother Harry, and, upon further questioning, the memory of Mickey Frank entirely deserted him, and he failed to remember anything about the transaction at all (Rec. 103-4, 112-3). According to Harry Frank, Greengaard and Kiser paid the money to him, and he thereupon drew his and Mickey's share from the bank, but he immediately changed his statement and said that it was Mickey who drew out the money (Rec. 116). Greengaard, a thirty

dollar a week waiter (Rec. 119), said that he got his $3,250 out of a safe deposit vault where he had kept it for a couple of years and paid it to Mickey Frank, and was not present when Kiser paid any money (Rec. 120). Mickey Frank said that Perlman called him up and told him to bring down the money, and that he thereupon gave his $13,000 to Harry and sent him down to Perlman's (Rec. 101), but it appears from the statement which Mickey Frank made to Capt. Ryan that Mickey first said that the sum was $13,500, and that it was paid on Thursday morning by Mickey to Perlman and Heitler (Rec. 111).

Harry Frank said that he and Greengaard arrived at Perlman's between 11:00 A. M. and 12:00 M., went into a booth with Perlman, paid him the money (Rec. 114) and did not get or ask for a receipt, although he had never before paid out so much money without getting a receipt. Greenberg was not present, but Heitler came in after the money was paid and Frank spoke to him (Rec. 117). Greengaard, however, who was with Harry Frank, did not hear Frank speak to Heitler, nor did he even see Heitler there, although he had known him by sight for a number of years (Rec. 120). Harry Frank and Greengaard thereupon returned to Frank's coffee shop, where, about 2:30 P. M., according to Mickey Frank, Perlman telephoned to Harry Frank (Rec. 102), while Harry was just as sure that it was Mickey whom Perlman called up (Rec. 114, 118). Mickey at first said that he thereupon ordered the truck to haul the liquor (Rec. 102), but thereafter said it was Harry who ordered the truck (Rec. 113). Harry, in turn, admitted at first that he got the truck (Rec. 117), but thereafter stated that it was Mickey who ordered the truck (Rec. 118). In any event, Harry Frank, Louis Greengaard and Kiser then went to the appointed rendezvous for the trucks

(Rec. 117). They first stopped at 61st and State Streets to meet Perlman, but he was not there. Harry Frank said that he saw Greenberg at 61st Street, but when asked to describe where he stood, changed his testimony and said that he did not see him at 61st Street, but was introduced to him by Greengaard at 63rd and State Streets, but no one was with him (Rec. 117). Greengaard, however, said that they first went to 63rd and State Streets where he saw and talked to Greenberg (Rec. 119). He did not, however, hear Harry Frank say anything to Greenberg, but he might have introduced the one to the other. Greengaard did not see Heitler at 63rd Street—it was Perlman whom he saw (Rec. 121). Later in the evening, Perlman told Frank and Greengaard to go to 79th and State Streets, and about 9:30 P. M. told them to go to 81st and Vincennes to get the whiskey, which they did. Harry Frank and Greengaard arrived at the car where they saw Heitler, Perlman and Greenberg around the car and the trucks, and Perlman told him to go and get his stuff. Harry at first said that he received one hundred cases, but immediately said that Greenberg, who had a piece of paper in his hand, called out that Mickey Frank was first with one hundred five—one hundred cases (Rec. 114). Frank took one hundred five cases, although he was only to get one hundred, and throughout the attempted explanation of the extra five cases displayed the usual change in testimony, first saying that Perlman had called him up about the five cases, and immediately asserting that it was Mickey to whom Perlman had spoken (Rec. 118). Greengaard was present, but he did not hear Greenberg say anything (Rec. 121).

Returning to the car after the holdup and loss of their liquor, Harry Frank saw Heitler, Perlman and Joy at the car (Rec. 115). He did not see Greenberg, nor were

there any trucks at the car at that time (Rec. 116). Greengaard, however, saw Greenberg at the car (Rec. 119). Heitler told Frank that if he had been held up by government men or policemen he would return the money and told Frank to see him the next day in Perlman's (Rec. 115).

The next day, Mickey Frank went to Perlman's saloon in the morning and saw Heitler, Perlman and Greenberg, who said they would return his money if he had been help up by government men or policemen; that they expected a carload of whiskey and would give him some (Rec. 102). This conversation took place on one of the settees (shown on defendant Perlman's exhibits 1, 2, 3 and 4, Rec. 211) and no attempt was made to lower their voices, although a crowd was in the saloon getting lunch (Rec. 113). Although Mickey Frank did not mention Greengaard as having been present, the latter said that he went to Perlman's with Mickey and saw Heitler, Perlman and Greenberg, but did not talk to them. He also said that Frank talked to Greenberg (Rec. 121), but this is denied by Mickey (Rec. 113). We call attention to the fact that Mickey said that when he went to see about getting his money, he went down about two steps into a saloon (Rec. 113). Of course, Perlman's place is right on a level with the street, but to enter Adolph Georg's place, which was Joy's hangout (Rec. 131, 147), it is necessary to descend a couple of steps (Rec. 131).

At 2:00 A. M., on the morning of Sunday, October 3rd, while Mickey Frank was in his coffee shop, waiting for his night man to appear (Rec. 104), he received a call from Capt. Ryan, requesting his presence at the Englewood police station. Frank arrived there before Heitler and Perlman and made his statement to Capt. Ryan, which appears at Rec. 111, and which his testimony at the

trial contradicts in important details. He said that Heitler came in, put his hand up to his throat and told him in Jewish to shut up, which Frank did and was thereupon locked up. This threat of death was made in a room 10 by 12 in the presence of Capt. Ryan, his secretary, and other police officers (Rec. 101, 104), but was not seen or heard by the secretary, who was within two feet of Heitler (Rec. 197). But Joy saw it (Rec. 134). Heitler and Frank were then put in the same cell without any remonstrance from Frank, and both left the station at the same time, but had no conversation (Rec. 101).

Mickey also testified that about a week after the hearing at Englewood, Heitler, Perlman and Greenberg came to his place, at 9:00 P. M.; that Heitler walked in, handed Frank $7,000, said that that was all he was going to get and walked out with Perlman and Greenberg (Rec. 102). Not a word was spoken by Frank, Perlman or Greenberg (Rec. 113). Harry Frank said that he saw Heitler, Perlman and Greenberg in his place in the evening a few days after the holdup and that they talked to him, but not about this deal (Rec. 115). He soon said, however, that Greenberg was not with them (Rec. 119). Mickey also said that about a week after he received the $7,000, Heitler and Perlman came to his place again and asked him if he had said anything to anyone, and he replied that he had not (Rec. 102). Then some government men came after Mickey and he got his lawyer, who went to see Mr. Kelly three times, after which Mickey was instructed by his lawyer to tell what he knew (Rec. 104). Greengaard and Harry went through the same performance, having the same lawyer (Rec. 116, 121).

III.

The story as told on the witness stand by Mossy Joy and John Miller.

On September 29th, Joy and Miller met one Moore, who, having reason to believe that they would purchase liquor (Rec. 271), took them to "Heitler, Perlman and Greenberg's place at the corner of Fifth Avenue and Washington Street," in Chicago, where he said they could buy whiskey (Rec. 123). Parenthetically, Moore was formerly engaged in the oil operating business, and, at the time of the trial, was engaged in selling the bonds of the Missoula Placer Mining Company, of Missoula, Montana, a Delaware corporation, the owner of a mine which "has been worked" (Rec. 271). According to Joy, they then purchased the whiskey, and Heitler told them that he expected a carload every week, that he had just borrowed $35,000 from Senator Broderick and $15,000 from Nicholas Hunt (Rec. 123). Miller, who was present, failed to hear any reference to Senator Broderick or to Mr. Hunt (Rec. 149).

The next day, Joy and Miller returned to Perlman's saloon at 7:00 P. M., and gave Perlman, Heitler and Greenberg $10,824 for eighty-two cases at $132 per case, and were told by Heitler to return the next day when they would be told when and where they could get the whiskey (Rec. 124). After narrating at length how the money was paid to Greenberg, who tried five times to count it, Joy conceded that he did not know whether or not Greenberg was present (Rec. 137). Joy then took his departure and returned about 9:30 P. M., when he failed to see Perlman, but did see two or three bartenders (Rec. 137), although Perlman only employed one (Rec. 235).

On Friday, October 1st, according to the story of these

two gentlemen, they met Ambrosi at the Elks' Club, about 1:00 P. M., and the three of them then went to Perlman's and paid Ambrosi's money, $2,780, to Heitler, Perlman and Greenberg (Rec. 124). Joy said that Ambrosi gave the money to Miller, who gave it to Perlman (Rec. 137, 138). Miller agrees that the money eventually got to the hands of Perlman, but said that Ambrosi gave the money directly to Perlman (Rec. 150). In any event, Ambrosi received a receipt for his money, not from Heitler, Perlman or Greenberg, but from Joy and Miller (Rec. 124, 137, 144). Then Joy made arrangements with Greenwald to meet him, and he and Miller went to 61st and Wentworth Avenue where they met the truck. According to Joy, he remained with the truck until 5:00 or 6:00 P. M., when he went to 63rd and State Streets where, about 8:30 P. M., he met Miller, Heitler, Perlman and Greenberg (Rec. 124). But Greenwald, also a government witness, testified that Joy met the truck, but immediately went off and was not seen again for several hours (Rec. 139). Miller's story was that he and Joy went to 61st and Wentworth Avenue where Joy remained with the truck while he, Miller, went to 63rd Street where he saw Heitler, Perlman and Greenberg, gave Heitler a check for some more whiskey and overheard a conversation between Heitler and Greenberg about the difficulty in locating the car. He was instructed by Perlman to go to 82d and Vincennes, where Joy took the truck over to be loaded (Rec. 144). Miller saw Heitler's machine at 82d and Vincennes (Rec. 144), but was unable to state on the witness stand what make of car it was, although the car was a Hudson, and Miller had been and was a dealer in automobiles, could distinguish a Hudson from other cars, and was quite familiar with all makes of automobiles (Rec. 150). Joy testified that he saw Heitler, Perlman and Greenberg at the car at Gresham Station, and, while they were talking, eight or nine policemen

came up with drawn revolvers and some one told Heitler to "take care of them." Heitler then led away Sergeant Judge and upon his return said that he had given Judge $1,000 (Rec. 124). Koeller, on direct examination, said, however, that when the fifth truck was at the car, a police officer, Judge, came up and was led away by a man who had a diamond pin in his tie and a diamond ring on his finger (Rec. 98) and Lynch testified that Heitler was not at the car nor could he have been there without being seen by him, Lynch (Rec. 228).

Joy and Miller left the car with the truck-load of whiskey and were held up, Joy in addition to losing his liquor, losing his diamond pin and diamond ring (Rec. 124, 144, 145). Joy said that he then returned to the car and saw Heitler. While they were talking, Frank came up and "started to put on a war dance" about being held up (Rec. 125). Joy was also "hollering" about the holdup (Rec. 115). No "hollering" or "war dance" about holdups was mentioned by Koeller (Rec. 97-100), nor was any such disturbance heard by Wissing (Rec. 222), O'Hara (Rec. 223-4) or Lynch (Rec. 227). Heitler then said for them to meet him at "my saloon." According to Joy and Miller, after leaving the car, they stopped at several saloons, among which was the saloon of Callaghan, a co-defendant, where Joy introduced himself as the man who was getting the whiskey. They finally arrived at Perlman's and waited there until Heitler, Perlman and Greenberg came in, about an hour later. Heitler told Joy to wait until the next day and he would find out who had taken the whiskey—if it was policemen he would give Joy back his money. Heitler, Perlman, Greenberg, Joy and others then got into a machine and looked for the whiskey out on the South side (Rec. 125, 145). Hans, a co-defendant, who was supposed to have been along on this trip, offered a complete alibi which

we have not set forth, as he was acquitted by the jury (Rec. 202-5, 207-8, 215-18).

On October 2d, Miller called for Joy, who suggested going to Perlman's, which they did. Joy saw Heitler, Perlman and Greenberg in the saloon between 1:00 and 2:00 P. M. and asked Heitler what he was going to do about the money. Heitler turned over a check, saying that he had been to the bank and that payment had been stopped, that he was not going to give back any money (Rec. 125, 145). Ambrosi was there also, and threatened to kill Heitler, Perlman, Greenberg, Joy and Miller if he did not get his money back (Rec. 146). Miller said that he gave Ambrosi back every dime of his money (Rec. 146), but later denied giving him back any money (Rec. 150), while Joy said that Heitler gave back seventy-five per cent and Miller gave back twenty-five per cent (Rec. 138).

According to Miller, he and Joy then went to the Elks' Club where he saw McCann and Quinn, who now appear upon the scene for the first time. A man named Caruso, whom he had seen at Perlman's, came for Joy twice, and Joy went to Perlman's twice, returning each time to the Elks' Club. Joy told Miller that McCann and Trudel had been interfering with the conversation in Perlman's, but that he had agreed to let the whole matter go over until Monday, and that he was of the opinion that he would get his money back as Perlman thought they were entitled to it, and that he, Joy, had the telephone numbers of Heitler and Perlman (Rec. 145-6, 148). The story told by Joy is that he and Miller went to the Elks' Club, where he announced his unwillingnes to "holler." Heitler sent for him and told him to wait until Monday, that he thought he could pay Joy fifty per cent in money and fifty per cent in goods, as he had a car coming in next week. Then McCann, Quinn and Trudel came in and disturbed the argument, demanding commissions from

Heitler for the sale of Grand Dad whiskey. Joy finally told McCann that he would pay his commission himself, if McCann would leave him alone and give him a chance to get his $20,000 back. Joy returned to the Elks' Club and Caruso came for him again, whereupon he returned to Perlman's and Heitler, Perlman and Greenberg asked him if he had said anything to anybody, and he replied that he had not. McCann then came over and again Joy threatened to punch him, and did shove him away. Heitler then said to wait until Monday, to which Joy agreed, and went back to Elks' Club. Caruso came for him again, and again he went to Perlman's. This time, Perlman gave him his own and Heitler's telephone numbers and said for Joy to call them up if anything happened during the night, as Joy would get fifty per cent of his money back and the other fifty per cent in goods from the carload coming in Wednesday or Thursday. Joy replied "fine and dandy," and returned to the Elks' Club (Rec. 125-6), but neglected to inform Miller of this alleged arrangement for the return of their money (Rec. 149).

According to the stories told by these two, when Capt. Ryan telephoned to Miller, the latter called up Joy and insisted on Joy's going to the station also (Rec. 148). (As a matter of fact, Miller displayed a mere academic interest in the loss of his money, leaving all details as to recovery to the redoubtable Joy (Rec. 148, 149)). Joy at first refused to go, because he was satisfied with the arrangement for repayment which he had made with Heitler, Perlman and Greenberg and expected to get his money, but, nevertheless, finally consented to go, which he did without telephoning to either Heitler or Perlman (Rec. 128, 139). Immediately upon Joy's arrival at the station and without Heitler's having said that he was going back on his alleged arrangement, Joy began addressing to Heitler such vile language that he was stopped by the court in its repetition (Rec. 126, 134). The story

had appeared with large headlines in the Chicago Tribune, which Capt. Ryan had in front of him. Miller asked Joy how the story got in the paper and talked with Dougherty and Lingle, Tribune reporters, who were present. Lingle did not say that he had been to Joy's house, but Dougherty told him how he got the story (Rec. 149). Joy, however, did not remember that the story was in the paper, but, in the same breath, said that Quinn gave it out (Rec. 133).

Joy testified that, a few days later, Heitler called him up and said that he would pay fifty per cent of the money to the saloonkeepers, but that he would not pay Joy or Miller anything, and that Joy and Miller would have to leave town, to which Joy agreed (Rec. 127), notwithstanding the fact that the only reason he testified in the case was because he lost his money and notwithstanding the further fact that he would have taken it at any time from anyone and remained silent (Rec. 132-3). To corroborate his statement, and after the case got to the point where Joy admitted that he had to produce witnesses to protect himself, Joy produced Edward Todd as a witness in rebuttal, who testified that Joy called him up the day after he read about the whiskey robbery (probably Monday) and told him to go to a pool-room at Chicago and Paulina Avenues and meet him there. Joy did not appear, but "the men called Perlman and Mike" appeared and offered him a piece of paper which they said was a check, but which Todd refused to accept, saying that he had dealt with Joy. That night, Todd received an envelope containing $1,200 in cash, and called up Joy who told him that he would see that he got the rest. The next day Todd received $750. Todd did not, however, offer to identify Perlman and Heitler as "the men called Perlman and Mike" (Rec. 273-4).

Joy said that Lingle, the reporter, was not present at any interview which he had with Messrs. Clyne and

Kelly, the government attorneys, and that he did not meet Messrs. Clyne, Kelly and Lingle at the Union League Club (Rec. 133). Thereafter, he resumed the stand with a show of frankness and said that he had found out that he had been to the Union League Club and had then requested Assistant District Attorney Kelly to recall him to the stand in order that he might correct his testimony, but, in the next breath he had to admit that it was Mr. Kelly who had called him, told him that he was wrong, and told him to come back and correct his testimony. Joy then admitted that Lingle had been present at this interview (Rec. 143). Miller's story was that Lingle came to him and Joy and said that he wanted to take them to the government attorneys, and that they both agreed, and that thereupon Lingle took both Joy and him to see the government attorneys (Rec. 147).

IV.

Certain alibis offered by the defendants.

The defendants not only denied specifically all alleged facts implicating them in the whiskey handled by the government witnesses, but as to some alleged events, offered a complete alibi, testified to by witnesses whom no attempt was made to impeach. For instance, Joy and Miller testified that they saw Mandel Greenberg in Perlman's place on Thursday, September 30th, between 7:00 and 8:00 P. M. (Rec. 124, 136, 143-4, 149-50). It was clearly shown, however, that about 9:00 A. M. of this day, Greenberg reached the office of Wacker & Birk Brewery (Rec. 172), where he had worked for about thirteen years (Rec. 163, 165). According to the custom of the brewery, every member of the office or selling force must remain at the brewery all day on the last day of each month, their supper being served to them in the office (Rec. 165, 166-7).

Greenberg remained at the office, except for the lunch hour, until about 8:00 P. M. and during all of this time, he was at least thirty minutes ride from Perlman's saloon (Rec. 172). He helped the colored waiter set out the supper (Rec. 185-6) and during the meal took part in a discussion about a new beverage which the company was about to sell (Rec. 184). About 8:00 P. M., Greenberg and Mr. Kirchstein left the brewery together and took the elevated south to 51st Street, where Greenberg got off (Rec. 165), went straight to his hotel, where he remained the rest of the night (Rec. 175).

Joy and Miller also testified that they saw Greenberg in Perlman's place about 1:00 P. M. on Friday, October 1st (Rec. 138, 144) and Miller testified that he saw Greenberg at 63d and State Streets continuously from 3:00 to 7:00 P. M., except, perhaps for a few moments (Rec. 144, 150). Greengaard and Harry Frank also testified that they saw Greenberg at 63d and State Streets about 3 P. M. (Rec. 117, 121). Harry Frank, Greengaard, Joy and Miller all testified that they saw Greenberg at the car at Gresham Station while the car was being unloaded (Rec. 124, 138, 145, 118, 119), which was between 7:15 P. M. (Rec. 98) and 9:50 P. M. (Rec. 99). Joy and Miller also testified that they saw Greenberg in Perlman's after the car had been unloaded and after the holdup (Rec. 125, 145).

It was clearly shown, however, that on Friday, October 1st, Greenberg left his hotel at 50th Street and Michigan Avenue, about 11:15 A. M., together with his nephew Benjamin Rodkin, and went to 4737 St. Lawrence Avenue, the flat from which he had just moved. Some furniture had been left in the flat (Rec. 195) and the purchasers had come for it. Greenberg stayed in the flat until about 3:00 P. M., when one Bernstein came and got a rowing machine. Greenberg and Bernstein then went across the

alley to 4750 Champlain Avenue, where Greenberg had left some pulleys to an exercising machine when he moved, on October 1, 1919, from Champlain to St. Lawrence Avenue (Rec. 181). Greenberg got the pulleys and gave them to Bernstein (Rec. 201). About 3:15 P. M., Greenberg turned in the keys to his flat (Rec. 182) and went to his nephew's, Rodkin's, house and left some groceries. He then stopped at Mrs. Goldman's, where he also left some things (Rec. 183). He next went to his sister's, Mrs. Rodkin's, and arrived just at the time when she was lighting her candles, according to the orthodox Jewish custom, it being about sunset (Rec. 196, 200). He next stopped at a store of the Wahlgren Drug & Chemical Company, in which he was at that time financially interested. Rodkin then drove him to the hotel and left him there about 6:00 P. M. Greenberg had dinner with his family at the hotel, which is about a mile and a half from 63d and State Streets (Rec. 189), and was seen by the witness Lyons, the hotel keeper, who noticed his presence because it was the first time he had seen Greenberg (Rec. 188). Between 7:30 and 8:00 P. M., Rodkin and the witness Stone entered the lobby and inquired for Mr. Greenberg, Rodkin having previously met Stone in front of Garber's on 61st Street (Mr. Garber, who was introduced in rebuttal by the government, did not remember seeing Stone on October 1st, but admitted that Stone might have been there without his knowing it (Rec. 266)). Lyons thereupon called Greenberg, who came out of the sitting room and met Rodkin and Stone. The latter three then went upstairs to Greenberg's apartment, where they remained for about half an hour, when Greenberg, his daughter Lillian, Stone and Rodkin left the hotel and went to the moving picture show at the New Park Theatre on 51st Street, where they remained until about 10:30 P. M. (Rec. 186-7, 199), at which time Green-

berg and Lillian left Stone and Rodkin and went home, stopping at a fruit store on the way (Rec. 173-5, 206-7).

Harry Frank and Greengaard testified that they saw Perlman at 79th and State Streets at 9:00 and at 9:30 P. M., on Friday, October 1st (Rec. 114, 119). Joy and Miller testified that they saw Perlman at 63d and State Streets at various times in the afternoon and later saw him at the car while it was being unloaded (Rec. 124, 145), and they further testified that they saw Heitler at 63d and State Streets and later on saw him at Gresham Station about the car (Rec. 124, 144, 145). Perlman testified that he arrived at his place at the usual time, about 11:00 A. M., and stayed there until midnight (Rec. 242), and that he paid his rent to the agent of the building between 5:30 and 6:00 P. M. (Rec. 239). Heitler testified that he left his home about 10:30 A. M. and went down town. He went to see Mr. Schar (who owned a factory at 1814 West Harrison Street and who at the time of the trial had had a stroke of paralysis) from about 3:15 to 5:15 P. M. Thereafter he went to the office of Mr. Cohen, his attorney, and then to supper (Rec. 249). Heitler's chauffeur met him about 7:30 P. M. and took him to Perlman's (Rec. 257), where he saw Perlman behind the bar (Rec. 249). Shortly thereafter, Messrs. Cohen, Feldman and Hoffman came in and remained to play cards with Heitler until Joy and Miller came in, about 11:00 P. M., and accused Heitler of having "been in on" the holdup and of taking their whiskey (Rec. 257, 265). After Perlman had closed up the place, Heitler drove away in his machine with Messrs. Cohen, Feldman and Hoffman (Rec. 250, 265).